No. 91-1231-CSY
Status: GRANTED

Docketed:
January 29, 1992

Title: United States, Petitioner
v.
Alvin J. Dixon
and
United States, Petitioner
v.
Michael Foster

Court: District of Columbia
Court of Appeals

Counsel for petitioner: Solicitor General, Herbert,Rosemary

Counsel for respondent: Klein,James W.

2nd case: United States v. Michael Foster, No. 89-449, Oct. 31, 1991.

Entry	Date	Note	Proceedings and Orders
1	Jan 29 1992	G	Petition for writ of certiorari filed.
3	Feb 26 1992		Order extending time to file response to petition until April 4, 1992.
4	Apr 6 1992		Brief of respondent Alvin Dixon in opposition filed.
5	Apr 6 1992	G	Motion of respondents for leave to proceed in forma pauperis filed.
6	Apr 8 1992		DISTRIBUTED. April 24, 1992
7	Apr 17 1992	X	Reply brief of petitioner United States filed.
8	Apr 27 1992		Motion of respondents for leave to proceed in forma pauperis GRANTED.
9	Apr 27 1992		Petition GRANTED.
			**********
11	Jun 11 1992		Order extending time to file brief of petitioner on the merits until June 19, 1992.
12	Jun 19 1992		Joint appendix filed.
13	Jun 19 1992		Brief of petitioner United States filed.
14	Jun 19 1992		Brief amici curiae of Ayuda, et al. filed.
16	Jul 2 1992		Order extending time to file brief of respondent on the merits until August 3, 1992.
17	Jul 27 1992		Record filed.
		*	Certified proceedings District of Columbia Court of Appeals and Superior Court of District of Columbia.
18	Aug 3 1992		Brief of respondents filed.
19	Aug 27 1992		Reply brief of petitioner filed.
20	Oct 13 1992		SET FOR ARGUMENT WEDNESDAY, DECEMDER 2, 1992. (2ND CASE)
21	Oct 15 1992		CIRCULATED.
22	Dec 2 1992		ARGUED.
23	Dec 2 1992		Record filed.
		*	Original proceedings District of Columbia Court of Appeals (Michael Foster, No. 89-449)

(1) 91-1231

Supreme Court, U.S.
FILED
JAN 29 1992
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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84

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

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UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgments of the District of Columbia Court of Appeals in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 598 A.2d 724. The opinions of the Superior Court of the District of Columbia in *Foster* (App., *infra*, 21a-24a) and *Dixon* (App., *infra*, 25a-57a) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 58a-59a) was entered on October 31, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

In each of these cases, the defendant violated a court order prohibiting him from engaging in certain conduct. In each case, the defendant was held in criminal contempt for violating the order and was sentenced to a term of imprisonment. The defendant in each case was also indicted on criminal charges arising from the same conduct for which he was held in contempt. The court of appeals dismissed the indictments, holding that criminal contempt proceedings, followed by prosecution for the same conduct, placed each defendant twice in jeopardy for the same offense, in violation of the Double Jeopardy Clause.

1. *Foster.* On July 29, 1987, Foster's estranged wife, Ana, filed a petition in Superior Court of the District of Columbia for a temporary protection order pursuant to D.C. Code Ann. § 16-1004(d) (1981). In support of her petition, she alleged that Foster had abused her repeatedly. App., *infra,* 22a. On August 12, 1987, Foster consented to the entry of a one-year civil protection order (CPO) under D.C. Code Ann. § 16-1005 (1981). The court accordingly entered an order stating that Foster must not "molest, assault, or in any manner threaten or physically abuse" his estranged wife. App., *infra,* 4a; Gov't C.A. Br. 2. The court also entered an order the same day forbidding Foster from engaging in any similar conduct toward his mother-in-law and ordering Foster to stay away from his mother-in-law's home and place of work. App., *infra,* 4a.

Within a short time, Foster began violating the orders. On September 22 and November 19, 1987, and on May 24, 1988, Ana Foster filed motions seeking to have Foster held in contempt for 16 alleged violations of the CPO. App., *infra,* 4a-5a. Foster's mother-in-law also filed a motion seeking to have Foster held in contempt, alleging six violations of the CPO that prohibited Foster from threatening her. App., *infra,* 5a. Among the allegations in the motions was that on November 6, 1987, Foster "grabbed [his wife] and threw her against a parked car," that on November 12, 1987, Foster "called [his wife] at home and threatened her," that on March 26, 1988, Foster "called threatening [his wife]," and that on May 17 he "called * * * threatening to kill [his wife]." The most serious allegation was that on May 21 he "threw [his wife] down basement stairs, kicking her body," and "pushed her head into the floor causing head injuries" which resulted in her losing consciousness. App., *infra,* 4a-5a.

The court heard evidence concerning the contempt charges at a three-day bench trial held on August 8-10, 1988. During the trial, eight witnesses testified. Ana Foster's counsel prosecuted the contempt. The United States did not participate in the trial. App., *infra,* 5a & n.8. Foster was found guilty of four counts of criminal contempt, including the two counts based on the November 6, 1987, and May 21, 1988, assaults on his wife.[1] He was found not guilty of the remaining contempt charges, including those based on the November 12, 1987, and March 26 and May 17, 1988, threats. App., *infra,* 6a-7a. He was sentenced to consecutive 150-day

[1] The other two counts were based on threats made by Foster against his wife on November 17, 1987, and a November 4, 1987, violation of the stay-away order relating to his mother-in-law. App., *infra,* 7a n.10.

prison terms on each of the four counts. See App., *infra,* 2a.[2]

Meanwhile, on July 21, 1988 (approximately two weeks before the contempt trial), the United States Attorney's office filed a complaint charging Foster with a single count of assault with intent to kill while armed, based on Foster's May 21, 1988, assault on his wife. On January 19, 1989, five months after the contempt trial, the grand jury returned a five-count indictment against Foster. Count 1 charged Foster with simple assault on November 6, 1987, in violation of D.C. Code Ann. § 22-504 (1981). Counts 2, 3, and 4, charged Foster with threatening to injure a person on November 12, 1987, and March 26 and May 17, 1988, in violation of Section 22-2307. Count 5 charged Foster with assault with intent to kill on May 21, 1988, in violation of Section 22-501. Counts 1 and 5 were based on the incidents for which Foster had been found guilty of criminal contempt; Counts 2, 3, and 4 were based on incidents for which Foster had been found not guilty of contempt after the criminal contempt trial. App., *infra,* 7a-8a, 22a.

Foster moved to dismiss the indictment on double jeopardy and collateral estoppel grounds. The trial court denied the motion, holding that criminal contempt is not the same offense as a substantive criminal charge based on the same conduct. App., *infra,* 23a. In addition, the trial court relied on D.C. Code Ann. § 16-1002(c) (1981), which provides that "[t]he institution of criminal charges by the United States Attorney shall be in addition to, and

[2] The Superior Court's order in Foster's subsequent criminal proceeding erroneously stated that Foster was sentenced "to one-hundred fifty (150) days on each of the *three* counts of contempt, sentences to be served consecutive to one another." App., *infra,* 22a (emphasis added).

shall not affect the rights of the complainant to seek any other relief under [the chapter regarding civil protection orders]." According to the court, that provision "clearly" demonstrates "an intent by the legislature to allow two different remedies for a violation of Civil Protection Orders," with the contempt prosecution "to protect the [party who obtained the order] and the ability of the Court to enforce its orders" while the substantive criminal prosecution was designed "to protect the community." App., *infra,* 23a-24a. The court did not rule on Foster's collateral estoppel arguments.

2. *Dixon.* On March 9, 1987, Dixon was arrested on a charge of second-degree murder while armed. The District of Columbia bail law provides that when an individual is released on bail, the judicial officer may impose any condition on the individual that "will reasonably assure the appearance of the person for trial or the safety of any other person or the community." D.C. Code Ann. § 23-1321(a) (1981). The judicial officer is directed to "issue an appropriate order containing a statement of the conditions imposed, if any, [and] shall inform such person of the penalties applicable to violations of the conditions of his release." § 23-1321(d). The bail law further provides that a person who has been released on bail and who has violated a condition of his release "shall be subject to revocation of release, an order of detention, and prosecution for contempt of court." § 23-1329(a).

Dixon was released on a $1500 surety bond. The printed release form stated that:

> You are hereby released on the conditions indicated below: These conditions will be in effect until your case is disposed of or until they are changed or amended by a judge. * * * You are to refrain from committing any criminal offense, the penalties for which are explained on the reverse side of this Order.

App., *infra,* 26a. On the reverse side, the order stated that "[y]ou are not to commit any criminal offense," and that "[a]ny violation of these conditions shall subject you to revocation of release, an order of detention, and prosecution for contempt of court." *Ibid.*

On January 15, 1988, while awaiting trial on the murder charge, Dixon was arrested for possession of cocaine with intent to distribute it, in violation of D.C. Code Ann. § 33-541(a)(1) (1981). On January 21, he was indicted for that offense. The government filed a motion to modify the terms of Dixon's release on the murder charge, and the Superior Court judge ordered Dixon to "show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified." App., *infra,* 9a-10a. A two-day hearing was held on the show cause order. An Assistant United States Attorney examined witnesses concerning the cocaine charges, and the witnesses were cross-examined by Dixon's counsel. Each side then presented closing arguments. At the conclusion of the hearing, the court concluded "that the government ha[d] established beyond a reasonable doubt that [Dixon] was in possession of drugs and that those drugs were possessed with the intent to distribute them." App., *infra,* 10a-11a. Accordingly, the court found Dixon guilty of criminal contempt under Section 23-1329(c)[3] and sentenced him to 180 days in jail. App., *infra,* 11a.

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[3] D.C. Code Ann. § 23-1329 (1981) provides in pertinent part:

> (a) A person who has been conditionally released pursuant to section 23-1321 and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.
>
> * * * * *
>
> (c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both.

Dixon thereafter moved to dismiss the cocaine indictment on double jeopardy grounds. The trial court granted the motion, App., *infra,* 57a, rejecting the government's arguments that contempt of court and possession of cocaine with intent to distribute it are different offenses for purposes of the Double Jeopardy Clause. See App., *infra,* 31a, 33a-35a. The court recognized that "its decision may pose some difficult questions regarding the interaction of judges and prosecutors in initiating criminal proceedings," App., *infra,* 56a, because a judge's decision to go forward with criminal contempt proceedings "would preclude the defendant from being tried for the underlying offense." *Ibid.*

3. The defendant in *Foster* took an interlocutory appeal from the trial court's denial of his motion to dismiss his indictment, and the government appealed from the dismissal of the indictment in *Dixon.* After each case was separately briefed and argued, the District of Columbia Court of Appeals consolidated the two cases, reheard them *en banc,* and ruled that both prosecutions were barred by the Double Jeopardy Clause. App., *infra,* 1a-20a.

The court of appeals concluded that this Court's decision in *Grady* v. *Corbin,* 495 U.S. 508 (1990), "control[led]" these cases and "greatly simplified the issues." App., *infra,* 13a-14a. The court explained that because the conduct on which the contempt proceedings were based was the same conduct for which the government subsequently sought to prosecute the defendants, the Double

Jeopardy Clause, as interpreted in *Grady* v. *Corbin*, barred the government from proceeding with the criminal charges. App., *infra*, 15a-16a.

Even though contempt proceedings are often initiated and prosecuted by a court or a private party, whereas a substantive criminal prosecution is initiated and prosecuted by the executive branch, the court of appeals held that the Double Jeopardy Clause was applicable to successive contempt and criminal proceedings. The court observed that criminal contempt "is a crime in the ordinary sense," App., *infra*, 18a (quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)), and that "the impact of a contempt prosecution on any defendant * * * would be the same regardless of whether the contempt adjudication is sought by the government or a private party." App., *infra*, 19a. Accordingly, the court expressly stated its disagreement with *Ex parte Williams*, 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc), in which the Texas Court of Criminal Appeals relied on the difference in the identity of the prosecuting party to conclude that a contempt prosecution does not bar a later prosecution for a substantive criminal violation. App., *infra*, 19a.[4]

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[4] On January 17, 1992, the trial court, on remand in *Foster*, dismissed the indictment over the government's objection. We have moved for reconsideration of the order dismissing the indictment, on the ground that the government intends to file a petition for a writ of certiorari in the *Foster* case. That motion is currently pending. Accordingly, there remains a live controversy between the parties. In any event, a lower court may not in effect preclude this Court from reviewing a lower court decision by dismissing the case before a timely petition for certiorari is filed or acted on by this Court. Therefore, even if the Superior Court does not reinstate the indictment, this Court will not lose jurisdiction in the *Foster* case. Cf. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983).

REASONS FOR GRANTING THE PETITION

Prior to this Court's decision in *Grady* v. *Corbin*, the prevailing view, embodied in decisions of this Court, the lower federal courts, and the state courts, was that criminal contempt proceedings do not bar prosecution of the same defendant for substantive criminal offenses based on the same acts. The District of Columbia Court of Appeals has held that *Grady* in effect overturned all of the considerable authority approving separate prosecutions for contempt and substantive criminal violations. The court of appeals' decision is thus in conflict with numerous pre-*Grady* decisions as well as several cases decided after *Grady*. If correct, the court of appeals' ruling would threaten the ability of state and federal courts to enforce compliance with their orders through the contempt sanction and the ability of prosecuting authorities to carry out their function in any case in which a single act violates both a court order and a criminal prohibition. In our view, the court of appeals' decision disregards settled principles of double jeopardy law that this Court did not intend to alter in *Grady*. Further review is therefore warranted.

1. Almost a century ago, this Court expressed the view that a conviction for criminal contempt does not bar a subsequent prosecution for a substantive criminal offense. In *In re Debs*, 158 U.S. 564 (1895), the defendants were held in summary criminal contempt for violating an injunction. Upholding the judicial power to punish contempt summarily, the Court stated that if a criminal prosecution should be brought against the defendants for the same conduct, "it will be no defence to such prosecution that they have disobeyed the orders of injunction served upon them and have been punished for such disobedience." 158 U.S. at 594; see also *id.* at 599-600 ("the penalty for violation of injunction is no substitute for and no

defence to a prosecution for any criminal offences committed in the course of such violation"); *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 330 (1904) (quoting above language).[5]

Two years later, the Court reiterated the same principle in a case involving Congress's contempt power. In *In re Chapman*, 166 U.S. 661 (1897), the defendant was indicted for refusing to answer questions put to him by a congressional committee. The defendant argued that, since Congress itself had the power to punish the same conduct as contempt, the statute impermissibly subjected witnesses to be twice put in jeopardy for the same offense. The Court rejected that argument, observing that "indictable statutory offences may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together." 166 U.S. at 672. Accord *Jurney* v. *MacCracken*, 294 U.S. 125, 151-152 (1935).[6]

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[5] In *Bloom* v. *Illinois*, 391 U.S. 194 (1968), the Court rejected the holding in *Debs* that courts have inherent power to punish serious contempts summarily. *Bloom* did not, however, disavow the statement in *Debs* that the same conduct could give rise to successive prosecutions for criminal contempt and a substantive criminal offense.

[6] Neither *Colombo* v. *New York*, 405 U.S. 9 (1972) (per curiam), nor *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam), are to the contrary. In *Colombo*, the defendant was first found guilty of criminal contempt for refusing to testify before a grand jury and then indicted under another criminal contempt provision of the state criminal code. This Court remanded for a determination whether the indictment was for the same refusal to testify. *Menna* apparently involved a similar fact pattern, and the case was similarly remanded to the New York Court of Appeals for "a determination of petitioner's double jeopardy claim on the merits," on which this Court "express[ed] no view." 423 U.S. at 63. The point made by this Court in *Debs* and *Chapman*—and in dispute here—is that a prosecution for criminal contempt does not bar a separate prosecution for a substantive criminal offense. Neither *Debs* nor *Chapman* discussed the issue in *Colombo* and *Menna*—whether a prosecution for criminal contempt would bar another prosecution for criminal contempt based on the same conduct by the defendant.

2. Prior to this Court's decision in *Grady* v. *Corbin*, the great majority of state and federal courts agreed that double jeopardy principles did not prohibit successive prosecutions for criminal contempt and substantive criminal offenses based on the same conduct.

Although the issue has not arisen frequently in the federal system, every court of appeals to reach the issue has adopted the majority view. In early decisions on facts directly analogous to those present here, the Sixth and Seventh Circuits each held that a defendant who sold liquor on his premises in violation of an injunction not to do so could be separately prosecuted for criminal contempt for violating the injunction and for a substantive criminal violation of the National Prohibition Act. See *Orban* v. *United States*, 18 F.2d 374 (6th Cir. 1927); *Hansen* v. *United States*, 1 F.2d 316 (7th Cir. 1924); see also *Lewinsohn* v. *United States*, 278 F. 421, 428 (7th Cir. 1921), cert. denied, 258 U.S. 630 (1922). The Eighth and District of Columbia Circuits have held that contempt of court may be prosecuted separately from substantive criminal offenses based on the same violations in cases in which the contempt consisted not of violation of a court order, but of a scheme to misrepresent material facts to a court considering a settlement of litigation, *O'Malley* v. *United States*, 128 F.2d 676, 684 (8th Cir. 1942), rev'd on other grounds, 317 U.S. 412 (1943), or assaulting a prosecutor during a robbery trial, *United States* v. *Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971) (summary contempt).[7] See

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[7] In *United States* v. *Garcia-Pupo*, 845 F.2d 8 (1st Cir. 1988), the court held that contempt of court under 18 U.S.C. 401(1) and retaliation against a government informant under 18 U.S.C. 1513 are

also *Merchants' Stock & Grain Co.* v. *Board of Trade,* 201 F. 20, 27 (8th Cir. 1912); *United States* v. *Ferrugia,* 604 F. Supp. 668, 672-673 (E.D.N.Y. 1985) (summary contempt); *United States* v. *Mirra,* 220 F. Supp. 361 (S.D.N.Y. 1963) (assault on prosecutor during trial; summary contempt); *Chicago Directory Co.* v. *United States Directory Co.,* 123 F. 194 (C.C.S.D.N.Y. 1903) (submission of false documents to court).[8]

Similarly, every state supreme court to consider the issue prior to *Grady* had held that the Double Jeopardy Clause does not bar separate prosecutions for contempt of court and substantive criminal violations based on the same act. A number of those cases arose from facts virtually identical to those presented in *Foster.* For example, in *People* v. *Totten,* 514 N.E.2d 959 (Ill. 1987), the defendant had battered his wife in violation of a court order and had been convicted of criminal contempt after a trial-like proceeding. The court held that the contempt conviction did not bar a separate criminal prosecution for aggravated battery.[9] Accord *Commonwealth* v. *Allen,* 486 A.2d

distinct offenses. The court noted that "none of the concerns addressed by [the Double Jeopardy Clause] are present" when a defendant is prosecuted separately for those two offenses arising out of a single in-court assault, 845 F.2d at 11-12, but the court did not reach the ultimate question whether such separate prosecutions would be permissible.

[8] Two district courts have taken the opposite view, that a prosecution for contempt may bar separate prosecution for a substantive criminal offense. See *United States* v. *Haggerty,* 528 F. Supp. 1286, 1295-1298 (D. Colo. 1981) (contempt proceeding for violating injunction against striking against government and prosecution under statute prohibiting such strikes); *United States* v. *United States Gypsum Co.,* 404 F. Supp. 619 (D.D.C. 1975) (contempt proceeding for violating injunction against price-fixing and prosecution for substantive antitrust violation).

[9] In another case also adjudicated in the *Totten* opinion, the court similarly held that a defendant convicted of summary contempt for striking the prosecutor in court could be separately prosecuted for aggravated battery.

363 (Pa. 1984) (assaulting wife in violation of court order), cert. denied, 474 U.S. 842 (1985); see also *State* v. *Newell,* 532 So.2d 1114 (Fla. Dist. Ct. App. 1988) (pouring acid on wife's car in violation of court order); *State* v. *Sammons,* 656 S.W.2d 862 (Tenn. Crim. App. 1982) (kidnapping child in violation of court order).

Other cases have addressed a variety of fact patterns in which a single act constituted both criminal contempt of court and a substantive criminal violation. In each case, the court held that successive prosecutions were not barred. See *State* v. *Chapman,* 739 P.2d 310 (Idaho 1987) (violation of court order by kidnapping daughter); *Long* v. *Commonwealth,* 197 S.W. 843 (Ky. 1917) (summary contempt for assaulting witness outside court and criminal assault); *Commonwealth* v. *Gallarelli,* 362 N.E.2d 923 (Mass. 1977) (conspiracy to bribe juror); *Church* v. *State,* 111 So. 2d 228 (Miss. 1959) (violation of injunction by committing liquor law violations); *State* v. *Yancy,* 4 N.C. 133 (1814) (summary contempt for assault in court); *Maples* v. *State,* 565 S.W.2d 202 (Tenn. 1978) (summary contempt for instituting fraudulent proceeding and giving false testimony); *Barrowman* v. *State ex rel. Evans,* 381 S.W.2d 251 (Tenn. 1964) (violation of injunction by committing liquor law violations); *Nicholas* v. *Commonwealth,* 45 S.E.2d 305 (Va. 1947) (violation of injunction by committing liquor law violations); see also *Ex parte Morris,* 227 P. 914, 915-917 (Cal. 1924); *Ex parte Allison,* 90 S.W. 870 (Tex. 1906) (violation of injunction by committing gambling law violations); *Fisher* v. *McDaniel,* 64 P. 1056 (Wyo. 1901) (bribing a witness).[10]

[10] Contra *State* v. *Hope,* 449 So. 2d 633 (La. Ct. App. 1984). In *State* v. *Thompson,* 659 P.2d 383 (1983), the Oregon Supreme Court

Many of the cases cited above have relied on the fact that the elements of criminal contempt are entirely different from the elements of the substantive criminal offenses at issue in those cases and that contempt and the substantive offenses are thus not "the same offense" under the traditional "elements" test that this Court described in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). See, *e.g.*, *United States* v. *Ferrugia*, 604 F. Supp. at 671-673; *People* v. *Totten*, 514 N.E.2d at 965; *Commonwealth* v. *Gallarelli*, 362 N.E.2d at 926; *Commonwealth* v. *Allen*, 486 A.2d at 368-370. Other cases have emphasized that the interest underlying criminal contempt—the vindication of the court's authority to protect the integrity of its proceedings and to enforce its orders—is entirely distinct from the interests supporting substantive criminal statutes that prohibit, for example, assault or the sale of liquor. See, *e.g.*, *Ex parte Morris*, 227 P. at 916; *Long* v. *Commonwealth*, 197 S.W. at 843-844; *State* v. *Sammons*, 656 S.W.2d at 868. Finally, some courts have relied on the fact that the court, not the executive branch, typically initiates criminal contempt prosecutions, and that barring substantive criminal prosecutions after a contempt prosecution would in effect give the court the power to control the executive branch's exercise of its power and duty to enforce the criminal law. See, *e.g.*, *Commonwealth* v. *Allen*, 486 A.2d at 367.[11] In short, the rationale in these cases has

held that a prosecution for criminal trespass was barred because the defendant had previously been convicted of contempt for violating an injunction forbidding him from entering a neighbor's land. The court, however, expressly declined to decide the case on federal constitutional grounds, instead basing its decision on a state statute precluding separate prosecution for two or more offenses arising from the same criminal episode. 659 P.2d at 387.

[11] In summary contempt cases, some courts have also relied on the fact that the defendant was never subject to "trial" in the contempt case and thus not put into jeopardy a second time when he was tried

varied, but the critical point is this: Prior to *Grady*, the overwhelming consensus was in accord with this Court's statements in *Debs* and *Chapman* that criminal contempt and a substantive criminal violation arising from the same act are not the "same offense" and may be separately prosecuted.

3. Since this Court's decision in *Grady*, a conflict has developed concerning whether successive prosecutions for criminal contempt and substantive criminal violations arising from the same act are permissible. In addition to the decision of the District of Columbia Court of Appeals in this case, the highest courts of Hawaii and South Carolina have held that *Grady* bars successive prosecutions in cases in which a defendant was held in criminal contempt for violating the terms of an injunction issued in a domestic relations case, and prosecuted for a substantive criminal offense based on the same conduct. See *State* v. *Kipi*, 811 P.2d 815 (Haw.), cert. denied, 112 S. Ct. 194 (1991); *State* v. *Magazine*, 393 S.E.2d 385 (S.C. 1990).[12]

The only other post-*Grady* decision from the highest court of a state with criminal jurisdiction has adhered to the traditional rule. In *Ex parte Williams*, 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc), the defendant shot and injured two neighbors in violation of an injunction forbidding him from causing or threatening to cause bodily injury to the neighbors. He was convicted of criminal con-

for the substantive criminal offense. See, *e.g.*, *Merchants' Stock & Grain Co.* v. *Board of Trade*, 201 F. at 26-27; *United States* v. *Mirra*, 220 F. Supp. 361, 366 (S.D.N.Y. 1963). That rationale is inapplicable in cases such as this, involving non-summary convictions for criminal contempt.

[12] A number of lower state courts have reached similar results in post-*Grady* decisions. See *State* v. *Mojarro*, 816 P.2d 260 (Ariz. Ct. App. 1991); *In re D'Attomo*, 570 N.E.2d 796 (Ill. App. Ct. 1991); *State* v. *Vanselow*, 572 N.E.2d 269 (Ohio Mun. Ct. 1991); *State* v. *White*, 591 A.2d 954 (N.J. Super. Ct. App. Div. 1991).

tempt and sentenced to 30 days' imprisonment in proceedings in which the State did not participate. The Texas Court of Criminal Appeals held that the contempt adjudication and sentence did not bar his subsequent prosecution for attempted capital murder.[13]

Noting that a private party, not the State, initiated and prosecuted the criminal contempt proceedings, 799 S.W.2d at 307 & n.8, the *Williams* court found the case to be controlled by the reasoning underlying the "dual sovereignty doctrine," which holds that prosecutions by different sovereigns for offenses arising from the same criminal acts do not violate the Double Jeopardy Clause.[14] See, *e.g.*, *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985); *United States* v. *Wheeler*, 435 U.S. 313, 329-330 (1978).

The court of appeals in this case expressly rejected the *Williams* court's result and analysis.[15] App., *infra*, 18a-19a. There is thus a square conflict between the decision in this case, as well as those in *Kipi* and *Magazine*, and the decision in *Williams*.

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[13] An intermediate state appellate court in Illinois has also rejected a similar double jeopardy argument after *Grady*. See *People* v. *Heard*, 566 N.E.2d 896 (Ill. App. Ct. 1991).

[14] The court declined to reach the question whether "all contempt adjudications"—even those in which the contempt conviction is sought by an agent of the State—"as offenses against the court, are by their nature 'different offenses' from statutory violations committed 'against the peace and dignity of the State.' " 799 S.W.2d at 307 n.11.

[15] The court of appeals found it significant that *Williams* did not discuss the impact of *Grady* on its decision. App., *infra*, 17a. The Texas Court of Criminal Appeals, however, was plainly aware of *Grady* and cited it in its opinion, see 799 S.W.2d at 307; the "dual sovereignty" analysis ultimately employed by the *Williams* court did not require further discussion of *Grady*.

4. This Court currently has under submission the case of *United States* v. *Felix*, No. 90-1599. That case presents questions regarding the effect of *Grady* v. *Corbin* on successive prosecutions for related criminal offenses. Although the Court's decision in *Felix* may clarify the scope of *Grady*, it is unlikely to resolve the issues raised in this petition, which involve the relationship between two different kinds of criminal proceedings. As defined by the legislature, the crimes at issue in this case—criminal contempt on the one hand, and assault and cocaine possession on the other—are plainly not the same offense. If they are to be regarded as the same offense, it is only because a court has ordered a party not to engage in criminal behavior, on pain of contempt. The question whether a contempt can be converted into the "same offense" as a statutory crime by virtue of the terms of a court's injunction is not presented in the *Felix* case. In addition, the *Felix* case does not involve the relationship between two independent branches of government, each of which has interests that may be vindicated by criminal proceedings. Accordingly, we believe that this case warrants review regardless of the Court's disposition of the *Felix* case.

5. As these cases demonstrate, *Grady* v. *Corbin* continues to sow confusion in the law of double jeopardy. In our view, *Grady* did not intend to draw into question well-established principles concerning prosecutions of the sort at issue here. If our interpretation of *Grady* is incorrect, however, it may be appropriate for the Court to reconsider the reasoning and result in that case.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JANUARY 1992

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-1375

UNITED STATES, APPELLANT

v.

ALVIN J. DIXON, APPELLEE

No. 89-449

MICHAEL FOSTER, APPELLANT

v.

UNITED STATES, APPELLEE

Appeals from the Superior Court of the
District of Columbia

(Hon. Curtis E. von Kann, Trial Judge in No. 88-1375)
(Hon. Evelyn E.C. Queen, Trial Judge in No. 89-449)

ON REHEARING EN BANC

(Argued en banc January 10, 1990
Decided October 31, 1991)

Before ROGERS, *Chief Judge,* FERREN, TERRY, STEADMAN, and SCHWELB, *Associate Judges,* and NEWMAN* and BELSON,** *Senior Judges.*

TERRY, *Associate Judge*: These consolidated appeals, which present the same issue, arise from trial court rulings on motions to dismiss indictments on the ground of double jeopardy. In one case the motion was granted; in the other it was denied. We hold that both motions should have been granted because both prosecutions were barred by the Double Jeopardy Clause of the Fifth Amendment. Accordingly, we affirm in one case (*Dixon*) and reverse in the other (*Foster*).[1]

Appellant Foster was prosecuted for criminal contempt for violating civil protection orders obtained by his wife and mother-in-law. After a bench trial in August 1988, he was convicted on four counts of criminal contempt, two of which were based on assaults committed against his wife on November 6, 1987, and May 21, 1988. He was acquitted, however, on eighteen additional counts, including those based on threats allegedly made against his wife on November 12, 1987, March 26, 1988, and May 17, 1988. The court later sentenced Foster to an aggregate of 600 days' imprisonment.

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* Judge Newman was an Associate Judge of the court at the time of argument. He was commissioned as a Senior Judge on March 11, 1991.

** Judge Belson was an Associate Judge of the court at the time of argument. He was commissioned as a Senior Judge on July 24, 1991.

[1] The two cases were originally argued before different divisions of this court. After each division became aware that both cases presented the same issue, the court *sua sponte* voted to consolidate them and rehear them together en banc.

In January 1989 Foster was charged in a five-count indictment with one count of simple assault,[2] one count of assault with intent to kill,[3] and three counts of threats to injure another person.[4] The two assault charges were based upon the same assaults which underlay Foster's contempt convictions, and the threats charges were based on the same alleged threats for which Foster had been acquitted of contempt. Foster moved to dismiss the indictment on the grounds of double jeopardy and collateral estoppel. The trial court denied the motion, and Foster noted an appeal.[5]

Appellee Dixon, while on pretrial release pending trial for second-degree murder, was arrested and indicted for possession of cocaine with intent to distribute it (PWID).[6] The trial court issued an order directing Dixon to show cause why he should not be held in contempt for violating a condition of his pretrial release, namely, to refrain from committing any criminal offense. At the hearing on the show cause order, the court found beyond a reasonable doubt that Dixon had possessed cocaine with intent to distribute it. Dixon was therefore adjudicated in criminal contempt for violating the conditions of his release and sentenced to 180 days in jail. He then filed a motion in the PWID case to dismiss the indictment on the ground of double jeopardy. The judge to whom the PWID case had been assigned granted the motion in a published opinion. *United States v. Dixon,* 117 Daily Wash. L. Rptr. 9 (D.C.

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[2] D.C. Code § 22-504 (1989).

[3] D.C. Code § 22-501 (1989).

[4] D.C. Code § 22-2307 (1989).

[5] The denial of a motion to dismiss an indictment or information on the ground of double jeopardy is immediately appealable. *Abney v. United States,* 431 U.S. 651 (1977).

[6] D.C. Code § 33-541 (a)(1) (1988).

Super. Ct. September 26, 1988). From that dismissal the government appeals.

In light of the recent Supreme Court decision in *Grady v. Corbin,* 110 S. Ct. 2084 (1990), we hold that the court in *Foster* erred in denying the motion to dismiss on the ground of double jeopardy. At the same time, we uphold the trial court's dismissal of the indictment in *Dixon,* again relying on *Grady v. Corbin.*

I

A. *Foster*

1. *The Contempt Proceedings*

On August 12, 1987, Judge Tignor of the Superior Court, sitting in the Intra-Family Branch of the Family Division, issued a civil protection order (CPO) stating that Michael Foster "shall not molest, assault, or in any manner threaten or physically abuse" his estranged wife, Ana Virginia Foster, for a period of twelve months from the date of the order. On the same day Judge Tignor issued a second CPO directing Foster not to "molest, assault, or in any manner threaten or physically abuse" Elvira Rivas, Mrs. Foster's mother. The CPO affecting Mrs. Rivas contained the added condition that Foster stay away from her home and place of work. Foster consented in writing to both orders.

Within a fairly short time, however, Foster began to violate these orders, particularly the one relating to his wife. On September 22, and again on November 19, Mrs. Foster filed motions to adjudicate Mr. Foster in contempt, asserting that he had violated the terms of the order. The second motion included allegations that on November 6 Foster "grabbed Petitioner and threw her against a parked car" and that on November 12 he "called Petitioner at

home and threatened her. . . ." Mrs. Foster filed a third motion on May 24, 1988, alleging additional violations of the CPO. This motion stated that on March 26 Foster "called threatening Petitioner," that on May 17 he "called . . . threatening to kill the Petitioner," and that on May 21 he "threw Petitioner down basement stairs, kicking her body. Respondent also pushed her head into the floor causing head injuries. Petitioner lost consciousness." In all, Mrs. Foster alleged sixteen violations of the CPO. Mrs. Rivas also filed a motion to adjudicate Foster in contempt, alleging six violations of the CPO pertaining to her.[7]

In August 1988 Judge Murphy presided over a three-day bench trial on the various charges of criminal contempt in the intra-family case. Mrs. Foster and Mrs. Rivas, both represented by counsel, were the petitioners, and Mr. Foster was the respondent. The United States was not a party and was not represented at that trial.[8] Eight witnesses testified in support of the contempt motions, including Mrs. Foster, Mrs. Rivas, and other family members. Photographs, medical records, and other items of tangible evidence were also admitted.

Mrs. Foster identified her husband as the man who had beaten her on November 6, 1987, near her place of work, and on May 21, 1988, at her apartment on Argonne Place, N.W. She also said he had threatened her on November 12, 1987, March 26, 1988, and other occasions. With respect to the November 6 assault, the court heard additional testimony from Mrs. Rivas and from a police officer, Kenneth White. Several witnesses testified about the

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[7] In a separate proceeding, Mrs. Foster moved for an extension of the civil protection order. *See Cruz-Foster v. Foster,* No. 90-1217 (D.C. October 17, 1991).

[8] We assume, for the purposes of this appeal, that the United States Attorney's Office had no notice of the contempt proceeding.

May 21 assault. Mrs. Foster said that Mr. Foster grabbed her and threw her down the basement stairs, then kicked her and hit her on the head until she lost consciousness. A neighbor, Ana Ruchlozo, said that she saw Mr. Foster in the apartment building on May 21, headed in the direction of the basement. Bryan Connell, a security guard, saw Mrs. Foster shortly after the assault and described her injuries ("she was bleeding very badly from the forehead [and] had very, very deep cuts on her forehead"). Connell testified that he also saw a man wielding a machete in the basement of the building soon after Mrs. Foster was injured, but that the man with the machete "was not Michael Foster." Medical records and photographs were introduced to document Mrs. Foster's injuries.

At the close of the petitioners' case, Mr. Foster's counsel moved for a judgment of acquittal on all counts. The court granted the motion with respect to seven counts, including those involving threats alleged to have been made by Foster on November 12 and May 17.[9] As to the remaining charges, however, the motion was denied.

Foster then took the stand in his own defense. He denied assaulting his wife on May 21, 1988, stating that he was in Norfolk, Virginia, visiting relatives on that date. He also denied assaulting his wife on November 6, 1987, or making threatening telephone calls to her at any time, including March 26, 1988. Finally, Foster testified that he had not threatened his mother-in-law but, to the contrary, had complied with the terms of the CPO.

The court found Foster guilty on four counts of criminal contempt, including those based upon the No-

[9] Mrs. Foster's attorney conceded that she had failed to sustain her burden of proof on four of the seven counts and asked to "withdraw" those counts. The court made clear, however, that jeopardy had attached as to those counts and granted judgments of acquittal instead.

vember 6, 1987, and May 21, 1988, assaults on Mrs. Foster.[10] As to those, the judge said:

> The Court is satisfied beyond a reasonable doubt that you did, contrary to your testimony, assault your wife near Kalorama Park, 11/6/87, that leading to the injuries described and testified to.
>
> The Court is also satisfied beyond a reasonable doubt that you committed the assault alleged to have occurred, and the Court is satisfied did in fact occur on May 21st, 1988, at the Argonne address, which led to your wife's hospitalization.

The court found Foster not guilty, however, of the remaining counts of criminal contempt, including the threats allegedly made against Mrs. Foster on March 26, 1988.

2. *Subsequent Criminal Proceedings*

On July 21, 1988, about two weeks before the contempt trial, the United States Attorney's Office filed a complaint charging Foster with a single count of assault with intent to kill while armed. The complaint and supporting affidavit alleged that on May 21, 1988, Michael Foster assaulted and tried to kill his wife, Ana Foster, at her apartment on Argonne Place. After a preliminary hearing, Foster was held for further action by the grand jury. Some time later—after the contempt trial—Foster filed a motion to dismiss the complaint and enjoin the grand jury proceedings, but while that motion was pending, the grand jury on January 19, 1989, returned a five-count indictment charging Foster with one count of simple assault, three

[10] The court also found Foster guilty of contempt based on threats made against his wife on November 17, 1988, and a November 4, 1987, violation of the stay-away order relating to Mrs. Rivas.

counts of threats, and one count of assault with intent to kill. The offenses were alleged to have occurred on November 6, 1987 (simple assault, count I), November 12, 1987 (threats, count II), March 26, 1988 (threats, count III), May 17, 1988 (threats, count IV), and May 21, 1988 (assault with intent to kill, count V); Mrs. Foster was named as the complainant in all five counts. All of these charges were based on events for which Foster had already been tried in the contempt proceeding before Judge Murphy. The November 6 and May 21 assaults were the basis of two of his contempt convictions, while the three charges of threats were based on incidents for which Foster was acquitted in the contempt trial.

Foster filed a motion to dismiss the indictment on the same double jeopardy grounds asserted in his previous motion to dismiss the complaint. In addition, with respect to counts II, III and IV, he moved to dismiss on the ground of collateral estoppel. In its opposition the government admitted that the five offenses alleged in the indictment were the same as those for which Foster had already been tried in the contempt proceeding. The government maintained, however, that principles of double jeopardy did not bar further prosecution because the legislature intended to allow multiple punishments, and because the contempt in this case was different from a substantive criminal offense.

The trial court denied the motion to dismiss in an oral ruling, followed a week later by a written order. Citing *United States v. Rollerson,* 308 F. Supp. 1014 (D.D.C. 1970), *aff'd*, 145 U.S. App. D.C. 338, 449 F.2d 1000 (1971), a summary contempt case, the court said in its order that under *Blockburger v. United States,* 284 U.S. 299 (1932), "the charges currently before the Court are not duplicative of the contempt charges of which defendant was convicted in 1988." The court continued:

> In the Intrafamily case defendant was found to be in violation of a Civil Protection (consent) Order whereby he was found to be in criminal contempt of Court. The elements of criminal contempt are "a contemptuous act and a wrongful state of mind". *See [In re] Gorfkle,* 444 A.2d 934, 939 (D.C. 1982), citing *In re Farquhar,* 160 U.S. App. D.C. 295, 298, 492 F.2d 561, 564 (1973). . . . [N]one of the charges has as an element a contemptuous act or a wrongful state of mind.

Referring to D.C. Code § 16-1002(c) (1989), the court concluded that "there is clearly an intent by the legislature to allow different remedies for a violation of Civil Protection Orders: one for contempt after willful violation of the order to protect the petitioner and the ability of the Court to enforce its orders, and additional proceedings in the Criminal Division to protect the community."[11] Neither the oral ruling nor the written order addressed Foster's collateral estoppel argument.

B. *Dixon*

On March 9, 1987, appellee Dixon was arrested on a charge of second-degree murder while armed. He was later released on a $1500 surety bond. The printed release form contained a provision that Dixon's freedom was conditioned upon his not committing a criminal offense. Some time later the grand jury returned an indictment charging him with first-degree murder while armed. On January 15, 1988, while awaiting trial on the murder charge, Dixon was

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[11] D.C. Code § 16-1002(c), which is part of the Code chapter dealing with intra-family proceedings generally, provides in pertinent part:

> The institution of criminal charges by the United States Attorney shall be in addition to, and shall not affect[,] the rights of the complainant to seek any other relief under this chapter.

This language was quoted by the trial court in its order.

arrested for possession of cocaine with intent to distribute it, and on January 21 he was indicted for that offense.

The government then filed a motion requesting modification of the conditions of Dixon's release in the murder case in light of his indictment on the cocaine charge. Judge Walton, to whom the murder case was assigned, issued an order requiring Dixon to "show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified." The order noted that "[a]mong the conditions of [Dixon's] pretrial release imposed by the court [was the requirement] that he '[r]efrain from committing any criminal offense. . . .' " The order advised Dixon of his right to be represented by counsel at the hearing and to present evidence in his own behalf.

The testimony of four Metropolitan Police officers at the show cause hearing established that on the afternoon of January 15, 1988, two officers patrolling in an unmarked police car saw Dixon and a woman standing outside an apartment building in an area that was a known "open air market" for narcotics. The officers watched as the woman handed Dixon some money. Then, as the officers got out of their car, Dixon saw them and fled into the apartment building and up the staircase, carrying a bundle of white packets in his hand. When he reached the second story landing, Dixon dropped the bundle of packets; the officers recovered it and placed Dixon under arrest. Within the bundle were nineteen zip-lock plastic bags, bound by a rubber band, containing 2716 milligrams of cocaine (approximately 150 to 200 milligrams per bag). Dixon's counsel cross-examined the government witnesses and introduced evidence on Dixon's behalf. After each side had presented closing arguments, Judge Walton "conclude[d] that the government ha[d] established beyond a reasonable doubt that [Dixon] was in possession of drugs and that those drugs were possessed with the intent to distribute them." Since such possession was a violation of a condition of Dixon's release, the judge found him guilty of criminal contempt under D.C. Code § 23-1329 (c) (1989)[12] and sentenced him to 180 days in jail.

Dixon thereafter moved to dismiss the cocaine indictment, arguing that prosecution on that charge was barred by the Double Jeopardy Clause. The court granted the motion, reasoning that the drug charge was the "same offense" as the criminal contempt conviction, and citing *Blockburger v. United States, supra,* 284 U.S. at 304, as stating the applicable test for determining whether the two offenses were the same for double jeopardy purposes. Dixon's alleged contempt had been based on that part of the court's release order directing him to refrain from committing any criminal offense. To prove the contempt, the government had presented evidence that he possessed nineteen packets of cocaine with the specific intent to distribute them. The court said:

> These are precisely the same *facts* which the government would need to prove in the instant [drug] case in order to secure a conviction, and no additional facts

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[12] D.C. Code § 23-1329 provides in pertinent part:

> (a) A person who has been conditionally released pursuant to section 23-1321 and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.
>
> • • • • •
>
> (c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both.

> would need to be proven. Thus, while contempt is itself a general intent offense, the particular contempt of which [Dixon] was convicted included a specific intent element as a necessary component of proving the commission of a criminal offense.

United States v. Dixon, supra, 117 Daily Wash. L. Rptr. at 13 (emphasis in original).

The court also rejected the government's argument, based on *Albernaz v. United States,* 450 U.S. 333 (1981), that even if the offenses were not separate and distinct under a *Blockburger* analysis, the *Blockburger* test was solely a rule of statutory construction and did not control when there was a clear indication of contrary legislative intent. The government argued that Congress clearly intended contempt of court and drug trafficking to be separate offenses: the contempt statute was designed to preserve the authority of the court and the integrity of the judicial process, whereas the purpose of the drug statute was to protect society from the evils of drug trafficking. The court, however, interpreted *Albernaz* as saying only that a contrary legislative intent could defeat multiple punishments otherwise allowable under *Blockburger*: *Albernaz,* said the court, "certainly does not hold that multiple prosecution or punishment of offenses which *fail* the *Blockburger* test is nonetheless permissible if the legislature manifested a clear intention to authorize such multiple punishments." *United States v. Dixon, supra,* 117 Daily Wash. L. Rptr. at 13 (emphasis in original), citing *Albernaz, supra,* 450 U.S. at 345 (Stewart, J., concurring).

Finally, the court acknowledged that a judge's unilateral decision to conduct a criminal contempt hearing would preempt subsequent prosecution for the offense which also constituted the contempt. The court suggested, however, that the government could avoid such a result by requesting the judge to defer the contempt proceeding. The

court reasoned that "[i]n most—but perhaps not all—instances, it would seem appropriate to accommodate that request and give the government a reasonable opportunity to prosecute the substantive offense." *United States v. Dixon, supra,* 117 Daily Wash. L. Rptr. at 17.

II

The Double Jeopardy Clause protects persons charged with crimes in three different but related ways. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969) (footnotes omitted). The two cases before us implicate the first two protections. Appellant Foster seeks to bar a second prosecution for the assaults that led to his contempt convictions, as well as a second prosecution on the threats charges for which he was found not guilty in the contempt proceeding. Appellee Dixon likewise seeks, and in fact has been granted, protection from being twice prosecuted for possession of cocaine with intent to distribute it.

In the briefs and at oral argument, the parties presented elaborate discussions in support of their respective positions on the subject of double jeopardy. The opinion of the trial judge in *Dixon* likewise analyzed at length the issues as he saw them. Soon after we heard oral argument, however, the Supreme Court decided the case of *Grady v. Corbin,* 110 S. Ct. 2084 (1990). That decision has greatly simplified the issues and has made our task much easier than it was when these cases first landed on our docket. With *Grady* on the books, we need not consider most of the arguments presented by the parties or the points made by the trial court in *Dixon.* Rather, we hold that *Grady* is

controlling and that it requires us to sustain the claim of double jeopardy in both cases.

In *Grady v. Corbin* the defendant, Thomas Corbin, received two traffic tickets after his automobile crossed the center line on a New York highway and struck two oncoming cars, causing the death of one person and injuries to another. One ticket charged Corbin with the misdemeanor of driving while intoxicated,[13] and the other charged him with failing to keep to the right of the median. Within a few days, the district attorney's office began to gather evidence for a homicide prosecution. Corbin, however, appeared before a town justice court about three weeks later and pleaded guilty to both traffic charges. No member of the district attorney's office was present, and the presiding judge was unaware of the fatality or of the pending homicide investigation. The judge accepted the plea and later imposed a $350 fine and suspended Corbin's license for six months.

Two months after that, a grand jury indicted Corbin on several charges, including manslaughter and third-degree reckless assault, arising out of the traffic accident. Corbin challenged the indictment on double jeopardy grounds. The New York Court of Appeals sustained his challenge, and the state brought the case to the Supreme Court. That Court, adopting a "suggestion" made in *Illinois v. Vitale,* 447 U.S. 410, 420 (1980), held that the Double Jeopardy Clause bars a second prosecution "if the prosecution [seeks] to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution." *Grady v. Corbin, supra,* 110 S. Ct. at 2087.

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[13] A blood test, taken shortly after the accident, revealed that Corbin had a blood alcohol level of .19, almost twice the level at which it is illegal to operate a motor vehicle in New York.

The Court in *Grady* began its analysis by referring to "the traditional *Blockburger* test" for determining whether one offense is a lesser included offense of another:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, supra, 284 U.S. at 304, cited in *Grady v. Corbin, supra,* 110 S. Ct. at 2090. The Court concluded, however, that *Blockburger* did not fully resolve the double jeopardy issue:

> [A] subsequent prosecution must do more than merely survive the *Blockburger* test. As we suggested in [*Illinois v.*] *Vitale,* the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

Id. at 2093 (footnote omitted.) This is not, the Court said, an "actual evidence" or "same evidence" test. "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." *Id.*

Our focus here, then, must be on the conduct underlying the contempt convictions of Mr. Dixon and Mr. Foster, rather than on the nature of the evidence or the identity of the witnesses at the two contempt trials. It is for this reason that we have summarized in some detail the facts presented at each of the contempt proceedings. Given those facts, and given the criminal charges against each defendant, it is obvious—indeed, it is undisputed—that the conduct which underlay their contempt prosecu-

tions included, in whole (*Dixon*) or in part (*Foster*), the very same conduct for which the government now seeks to try them in the two pending criminal cases. *Grady v. Corbin* compels us to hold that those cases cannot be tried, now or ever. The Double Jeopardy Clause forever bars any further prosecution of either Dixon or Foster for the conduct which led to their contempt convictions or, in Foster's case, any conduct charged which the court, after hearing the evidence, held did not constitute contempt.

We note that the highest courts of at least two states, in post-*Grady* cases, have come to the same conclusion which we reach today. In *State v. Magazine,* 302 S.C. 55, 393 S.E.2d 385 (1990), the Supreme Court of South Carolina held that a contempt conviction for violating a civil protection order issued by a family court barred a subsequent prosecution for assault and battery based on the same facts which constituted the contempt. Because the state, in the assault trial, "proved the same conduct for which appellant was previously criminally sanctioned by the family court," the court held that, "under the [*Grady v.*] *Corbin* test, the successive prosecution in this case violated the Double Jeopardy Clause." *Id.* at __, 393 S.E.2d at 387. More recently, in *State v. Kipi,* 72 Haw. 164, 811 P.2d 815, *cert. denied,* 112 S. Ct. __ (1991), the Supreme Court of Hawaii—citing *State v. Magazine*—affirmed the dismissal of a complaint for burglary and threats because the defendant had previously been convicted of criminal contempt for violating a family court protective order. The contempt had consisted of the defendant's breaking into his former girl friend's home and threatening her and her housemates—the very same conduct which formed the basis of the criminal charges. Recognizing that the Supreme Court had broadened the scope of double jeopardy protection in *Grady v. Corbin*, the Hawaii court held that "under the *Grady* rule" Kipi could not be prosecuted

a second time "for offenses based on the same conduct as the contempt offense for which he was charged, convicted, and sentenced." *Id.* at __, 811 P.2d at 820. Although we are hesitant to proclaim a trend, we find ourselves fully in agreement with these decisions for the reasons we have already stated. *See also State v. Mojarro,* __ Ariz. __, 816 P.2d 260 (Ariz. Ct. App. 1991) (contempt prosecution for refusing to testify, in violation of a court order requiring defendant to testify, requires dismissal of subsequent indictment for "hindering prosecution" by refusing to testify); *State v. Vanselow,* 61 Ohio Misc. 1, 6, 572 N.E.2d 269, 272-273 (Ohio Mun. Ct. 1991) (contempt prosecution for violating protective order issued by domestic relations court bars subsequent criminal prosecution for same conduct).

Amici urge us to draw a distinction between the two cases before us. Regardless of what we decide in *Dixon,* they maintain that there was no prior jeopardy in *Foster* because the contempt proceeding in that case was initiated by private parties, Foster's wife and mother-in-law. In support of their argument, *amici* rely on a recent case from Texas, *Ex parte Williams,* 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc), which held that a prosecution for attempted murder was not barred by a prior contempt conviction based on the same conduct. With all due respect, we find the reasoning in *Williams* flawed and its holding unpersuasive.

The most glaring weakness in the *Williams* opinion is its utter failure to discuss *Grady v. Corbin* at all. In fact, *Williams* cites *Grady* only once, as authority for the unremarkable proposition that "the test for what constitutes the 'same offense' can differ according to whether single or successive prosecutions are involved." *Id.* at 307. The *Williams* court simply ignored the obvious fact, recognized specifically by the Hawaii court in *Kipi,* that *Grady*

had "broadened the scope of double jeopardy protection." *State v. Kipi, supra,* 72 Haw. at __, 811 P.2d at 819. With one exception, the several cases cited in *Williams* were all decided before *Grady* and are thus at least suspect as precedent on the issue presented here.[14]

Moreover, the Supreme Court has told us in no uncertain terms that criminal contempt "is a crime in the ordinary sense . . . [and that] convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same." *Bloom v. Illinois,* 391 U.S. 194, 201 (1968); *see In re Marshall,* 549 A.2d 311, 315 (D.C. 1988) (because "Marshall's conviction of contempt was certainly for a criminal violation," he was required, like any "person convicted" of a crime, to pay a specified sum to the Crime Victims' Compensation Fund). Case law has emphasized that the "impact on the individual defendant" is the main concern in determining whether jeopardy has or has not attached. *See, e.g., United States v. Wilson,* 420 U.S. 332, 343 (1975) (double jeopardy protections are based on "principles of fairness and finality [which] require that [the defendant] not be subjected to the possibility of further punishment"); *United States v. Jorn,* 400 U.S. 470, 479 (1971) (plurality opinion of Harlan, J.) ("society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in [the Double Jeopardy Clause]"); *Green v. United States,* 355 U.S. 184, 187-188 (1957) ("The underlying idea [of the Double Jeopardy Clause], one that is deeply ingrained in [our] system of jurisprudence," is to avoid "subjecting [the defendant] to embarrassment, expense, and ordeal and compelling him to live in a continuing state of

[14] The one exception is *Garcia v. State,* 806 S.W.2d 835 (Tex. Crim. App. 1990) (en banc), which did not involve the contempt/subsequent prosecution issue that confronts us in this case.

anxiety and insecurity"). While these and other cases speak in terms of the state or the sovereign as the prosecuting authority, their emphasis is plainly not on the identity of the prosecutor but on the impact of the trial on the defendant. The *Williams* court, in our view, went astray in failing to recognize this. It is self-evident that the impact of a contempt prosecution on any defendant—exposure to possible fine or imprisonment, or both—would be the same regardless of whether the contempt adjudication is sought by the government or a private party (or even the court itself, as in *In re Marshall, supra*). Thus we note our disagreement with *Williams* and hold that the identity of the prosecuting party in the contempt proceeding is irrelevant to the double jeopardy issue.

Finally, we offer an observation on the limits of our holding in the *Foster* case. The reader should not conclude that civil protection orders can no longer be enforced by contempt proceedings in the post-*Grady* era. The *Grady* Court itself recognized that a single act or transaction may constitute two or more types of "conduct," one of which may be punishable in a contempt proceeding and another in a subsequent criminal proceeding. The Court said that its holding

> would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (*i.e.*, if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence).

110 S. Ct. at 2094 (footnote omitted). Thus the Court envisioned Corbin's act of driving and hitting two other cars as encompassing at least three different types of conduct: driving while intoxicated, failing to keep right of the

median (for both of which he was convicted in traffic court), and driving too fast in heavy rain (for which he was not convicted in traffic court). In like manner, when a civil protection order prohibits assaults and also requires the respondent to stay away from the petitioner, and an assault is committed against the petitioner, the language we have quoted from *Grady* suggests that the breach of the stay-away portion of the order might be punished as a contempt without jeopardizing a later criminal prosecution for the assault itself. That hypothetical case, of course, is not before us today,[15] and thus we go no further than to note the possibility that it might be distinguishable from *Foster*.

For the reasons stated, we affirm the trial court's dismissal of the indictment in *Dixon* and reverse the denial of the motion to dismiss the indictment in *Foster*.

Affirmed as to Dixon,
reversed as to Foster.

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[15] In the contempt proceeding Foster was convicted of one violation of the order to stay away from his mother-in-law, see note 10, *supra*, but the later indictment did not include that incident.

APPENDIX B

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

Criminal Case No. F-8415-88

UNITED STATES OF AMERICA

v.

MICHAEL FOSTER

[FILED APR. 14, 1989]

ORDER

This matter is before the Court on defendant's Motion to Dismiss Indictment With Prejudice. The government opposes defendant's motion. In support of this motion defendant contends that to allow prosecution would be in violation of the Double Jeopardy Clause of the 5th Amendment because defendant has already been tried and convicted for these offenses in the Family Division of this Court where defendant was found in contempt for failing to comply with a Civil Protection Order.

The Court has reviewed the record, pleadings, the law, including statutory and case law and the *Amicus Curiae* Brief submitted by the Women's Legal Defense Fund.[1] Upon review the Court finds the following facts:

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[1] This Court granted the Women's Legal Defense Fund leave to appear *amicus curiae* on March 27, 1989.

1. On or about July 29, 1987 Ana V. Foster filed a Petition and Affidavit for Civil Protection Order with the Intrafamily Branch Office of the Superior Court of the District of Columbia (IF-630-87) alleging Threats To Do Bodily Harm, Simple Assault and Destruction of Property.

2. Ana V. Foster is the wife of the defendant.

3. On July 29, 1987 a Temporary Civil Protection Order was signed by Judge Sullivan.

4. A Consent Order was signed and filed on August 12, 1987 whereby defendant promised that he would not molest, assault or in any, manner threaten or physically abuse his wife. The Consent Order was effective August 12, 1987 through August 12, 1988, and extended for twelve (12) months on August 10, 1988 to August 10, 1989.

5. Defendant was found to be in criminal contempt of Court on August 10, 1988 for failing to comply with the Consent Order of the Intrafamily Division.

6. On January 26, 1989 *nunc pro tunc* to October 6, 1988, defendant was sentenced to one hundred fifty (150) days on each of the three counts of contempt, sentences to be served consecutive to one another.

7. On January 19, 1989 an indictment was filed in the instant case charging defendant with Simple Assault in violation of D.C. Code § 22-504, three (3) counts of Threatening to Injure a Person in violation of D.C. Code § 22-2307 and Assault With Intent to Kill in violation of D.C. Code § 22-501.

I.

The issue is whether defendant's conviction for contempt for violation of a Consent Order bars prosecution by the United States Attorneys Office for the conduct punished by sentencing for contempt. The Court finds that it does not.

II.

The charges currently before the Court are not duplicate of the contempt charges of which defendant was convicted in 1988.[2]

In *Blockburger v. United States,* 284 U.S. 299, 304 (1932) it was stated that:

> the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact the other does not.

In the Intrafamily case defendant was found to be in violation of a Civil Protection (consent) Order whereby he was found to be in criminal contempt of Court. The elements of criminal contempt are "a contemptuous act and a wrongful state of mind". *See Matter of Gorfkle,* 444 A.2d 934, 939 (D.C. 1982) citing *In re Farquhar,* 160 U.S. app. D.C. 295, 298 492 F.2d 561, 564 (1973) I submit that none of the charges has as an element a contemptuous act or a wrongful state of mind.

III.

This Court also draws support for the conclusion that double jeopardy does not act to bar prosecution by the United States Attorneys Office from D.C. Code § 16-1002 (c) (1988 Supplement):

> The institution of criminal charges by the United States Attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this chapter . . .

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[2] *United States v. Rollerson,* 308 F. Supp. 1014 (D.C.D.C. 1970) aff'd, 449 F.2d 1000 (D.C. Cir. 1971).

The statute allows Court intervention and action in the Family Division and the Criminal Division for the same acts. The statute recognizes different interests are protected in the Family Division and Criminal Division.

This Section further protects the defendant's self-incrimination and defense rights because it bars the use of information from the Family proceedings from use against him in the Criminal Division's proceedings.

From this code section there is clearly an intent by the legislature to allow two different remedies for a violation of Civil Protection Orders. One for contempt after wilfull violation of the order to protect the petitioner and the ability of the Court to enforce its orders and additional proceedings in the Criminal Division to protect the community.

IV.

Extensive briefs were provided by the defendant, the United States and the Women's Legal Defense Fund. The Court concludes the *Blockburger Test* in conjunction with D.C. Code § 16-1002(c) (1988 Supplement) permits this prosecution before the Criminal Division.

Accordingly, it is this 13th day of April, 1989.

ORDERED:

That the Motion to Dismiss Indictment With Prejudice is *DENIED.*

/s/ [Signature Illegible]
EVELYN E. CRAWFORD QUEEN
Judge

APPENDIX C

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
Criminal Division

F-442-88

UNITED STATES OF AMERICA

v.

ALVIN J. DIXON

OPINION AND ORDER

Introduction

The question presented by this case is whether one who has been convicted of criminal contempt for violating a court order that he not commit any criminal offense while on pretrial release may be subsequently prosecuted for commission of the substantive offense which formed the basis of the contempt conviction. This question has not been definitely answered by the United States Supreme Court, nor has it been addressed by the District of Columbia Court of Appeals. In his motion to dismiss the indictment, defendant argues that his prosecution here for possession with intent to distribute cocaine would violate the Double Jeopardy Clause of the Constitution since he has already been tried and convicted of contempt for violating his release order by engaging in such conduct. For reasons set forth below, this Court concludes that the Double Jeopardy Clause does indeed preclude the instant prosecution. Accordingly, defendant's Motion to Dismiss the Indictment will be granted.

BACKGROUND

On March 9, 1987, defendant was presented before a Commissioner of this Court on a charge of Second Degree Murder While Armed. In specifying the conditions upon which defendant could be released, the Commissioner utilized one of the Court's preprinted release forms which read at the top "YOU ARE HEREBY RELEASED ON THE CONDITIONS INDICATED BELOW: THESE CONDITIONS WILL BE IN EFFECT UNTIL YOUR CASE IS DISPOSED OF OR UNTIL THEY ARE CHANGED OR AMENDED BY A JUDGE." The Commissioner set a $1500 surety bond, ordered the defendant to appear for a line-up, and also checked the line on the form which states "you are to refrain from committing any criminal offense, the penalties for which are explained on the reverse side of this Order."[1] On March 10, 1987, defendant posted the $1500 surety bond and was released.

On January 15, 1988, while he was awaiting trial on the murder charge, defendant was arrested by officers of the Metropolitan Police Department and soon thereafter indicted for Possession of Cocaine With Intent to Distribute. That case was assigned to the undersigned judge, before whom defendant entered a plea of not guilty on February 1, 1988. On February 23, 1988, the government filed a Motion To Modify Bond in defendant's murder case, requesting that "Mr. Dixon be summoned to court to show cause why his conditions of pretrial release should

[1] The reverse side of the release order is headed "YOU ARE NOT TO COMMIT ANY CRIMINAL OFFENSE." Under this language appear several warnings, including the following: "Any violation of these conditions shall subject you to revocation of release, an order of detention, and prosecution for contempt of court (a fine of not more than $1000 or imprisonment [for] not more than 6 months of [sic] both)."

not be modified" because of "his obvious drug use and commission of another offense, as found by the Grand Jury."

On March 29, 1988, Judge Walton, to whom the murder case was assigned, issued an order requiring defendant to "show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified." The order asserted that commission of the offense of Possession of Cocaine With Intent to Distribute, if true, would indicate that defendant had not complied with the release condition that he "refrain from committing any offense." Order of March 29, 1988 in *United States v. Alvin Dixon, Sr.*, F 2670-87.

The order scheduled a hearing for a day in April, stated that defendant was entitled to be represented by counsel and could produce witnesses or evidence on his behalf, and ordered the government "to have the appropriate witnesses present at the hearing and prepared to testify concerning the alleged violation of defendant's pretrial release conditions." *Id.*

On April 14 and 20, 1988, Judge Walton held the ordered show cause hearing.[2] The government presented testimony of four witnesses, all members of the Metropolitan Police Department. Sgt. Larry W. Bailey and Officer Michael J. Cardello testified that on January 15, 1988 they observed defendant standing in front of 1016 4th Street, S.E., holding in his right hand a bundle of packets. Defendant, on seeing the officers, ran into the building. The officers recovered the bundle—containing nineteen plastic bags of apparent cocaine—and then

[2] On April 14, 1988, Judge Walton also amended defendant's release order in the murder case by adding the language "DO NOT USE ILLEGAL DRUGS" and requiring that defendant undergo weekly narcotics testing.

arrested defendant. Officer Joseph P. Roche testified that he took custody of the packets. Detective Charles F. DiDomenico testified that the Drug Enforcement Administration analysis showed that the nineteen plastic packets contained 2716 milligrams of cocaine (or approximately 150-200 milligrams per bag), that packets with this amount of cocaine are called "quarter bags" and usually sell for $25 each, and that possession of nineteen quarter bags bound by a rubber band, as found in this case, would indicate possession with intent to distribute the cocaine. Defendant's counsel cross-examined the government witnesses and offered some evidence for the defense. Following closing arguments by both sides, Judge Walton found that the government had proven beyond a reasonable doubt that defendant was in possession of cocaine with intent to distribute it, in violation of his release order that he refrain from committing any criminal offense. For this contempt of court, Judge Walton sentenced the defendant to imprisonment for six months.[3]

On May 17, 1988 defendant filed in the instant case his motion to dismiss the indictment. The government filed a written opposition. Following oral argument in August 1988, the Court took the matter under advisement in order to conduct some additional research on the issue presented.

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[3] In May 1988, Judge Walton granted defendant's motion to permit the contempt sentence to be served on a work release basis. In June 1988, defendant proceeded to trial on the case before Judge Walton which, by then, involved the charge of First Degree Murder While Armed. Defendant was acquitted of First and Second Degree Murder While Armed but convicted of Voluntary Manslaughter While Armed. Defendant's motion for new trial in that case is now pending.

I. DEFENDANT'S ARGUMENT FOR DISMISSING THE INDICTMENT.

Defendant's motion to dismiss the indictment is grounded on one of the great foundations of liberty derived from the Magna Carta, and now contained in the Fifth Amendment to the United States Constitution, namely, the protection against double jeopardy. That clause, applicable to the District of Columbia by its own terms, *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1973); *Wight v. Davidson*, 181 U.S. 371, 384 (1900); *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1898), and to the states via the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 787 (1969), provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The rationale for the protection is that "[w]hen a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *United States v. Wilson*, 420 U.S. 332, 343 (1975).

Defendant's argument rests on three well-recognized principles of double jeopardy jurisprudence.

First, defendant notes that the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted).

Next, the defendant submits that, as the Supreme Court made clear in *Brown v. Ohio*, 432 U.S. 161, 166 (1977), the "established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment" or successive prosecutions is that stated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932); i.e., "[t]he applicable rule is that where the same

act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."[4]

Finally, defendant argues that the instant prosecution does not require proof of any fact beyond those already required to be proven in the prior contempt trial. In the contempt trial the government was required to prove—and did prove to Judge Walton's satisfaction—that defendant willfully violated a condition of his pretrial release order by committing a criminal offense, namely, possession with intent to distribute cocaine. That necessarily required proof that the defendant knowingly possessed a useable quantity of cocaine with the specific intent to distribute it. The instant prosecution would also require proof that defendant knowingly possessed a useable quantity of cocaine with the specific intent to distribute it, and no additional facts would need to be proven. Thus, defendant argues, the instant case fails the *Blockburger* test and the present indictment must be dismissed on double jeopardy grounds.[5]

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[4] As the District of Columbia Court of Appeals observed in *Kingsbury v. United States,* 537 A.2d 208, 210 (D.C. 1988), the Supreme Court held in *Whalen v. United States,* 445 U.S. 684 (1980), that the *Blockburger* test is made applicable to the District of Columbia by D.C. Code § 23-112.

[5] Additionally, defendant argues that, even where two offenses may be deemed different under *Blockburger,* "successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown v. Ohio,* 432 U.S. 161, 166 n. 6. *See Ashe v. Swenson,* 397 U.S. 436 (1970); *In Re Nielsen,* 131 U.S. 176 (1889). *Accord, United States v. Felder,* No. 87-871 (D.C. Sept. 16, 1988). Because of its holding that the present case does involve the "same offense" (in the *Blockburger* sense) as that involved in defendant's contempt conviction, the Court need not consider whether this "collateral estoppel" branch of double jeopardy is applicable to the instant case.

II. IS THE BLOCKBURGER TEST MET HERE?

The government's initial response to defendant's motion is to argue that the present prosecution does not, under *Blockburger,* involve the same offense as that addressed in the contempt trial. Thus, the government contends, citing *In Re Gorfkle,* 444 A.2d 934, 939 (D.C. 1982), conviction in the contempt matter required proof of two elements, namely, (1) existence of a court order and (2) willful disobedience of the same. Possession With Intent to Distribute Cocaine involves three elements, namely, (1) that defendant possessed cocaine (2) that his possession was knowing and intentional, and (3) that he possessed it with the specific intent to distribute it. *See* Criminal Jury Instruction for the District of Columbia No. 4.32. Hence, the government argues, the elements of these two prosecutions are different since the present case requires proof of a specific intent (to distribute cocaine) while contempt is a general intent crime. *See Sykes v. United States,* 144 U.S. App. D.C. 53, 444 F. 2d 928 (1971); *In Re Hunt,* 367 A.2d 155 (D.C. 1976), *cert. denied,* 434 U.S. 817 (1977).

The government's argument is unsound because it mistakenly focuses on the "elements" of contempt and possession with intent to distribute cocaine. *Blockburger,* however, does not depend upon a comparison of the elements of offenses, or even whether the same or different evidence will be presented in each trial. Rather, the question is whether each provision requires proof of a *fact* which the other does not. *Blockburger v. United States, supra,* 284 U.S. at 304. *Accord, Kingsbury v. United States,* 537 A.2d 208, 211 (D.C. 1988).

In this case, the defendant's alleged contempt did not rest on violating general conditions of his pretrial release order, such as reporting to the Pretrial Services Agency for testing or staying away from prosecution witnesses.

Rather, it rested on that part of the order which directed him "to refrain from committing any criminal offense."[6] Accordingly, to obtain a conviction for this contempt, the government had to prove the commission of a criminal offense. The government undertook to do so by proving that at 5:00 p.m. on January 15, 1988, in the vicinity of 1016 4th Street, S.E., the defendant knowingly possessed nineteen packets of cocaine with the specific intent to distribute them. These are precisely the same *facts* which the government would need to prove in the instant case in order to secure a conviction, and no additional facts would need to be proven. Thus, while contempt is itself a general intent offense, the particular contempt of which defendant was convicted included a specific intent element as a necessary component of proving the commission of a criminal offense.

Consequently, it is clear that the present prosecution does not satisfy the *Blockburger* test since conviction of possession with intent to distribute cocaine in this case will not require proof of any fact which was not required to be proven in the earlier contempt trial.

III. DOES ALBERNAZ PROVIDE AN EXCEPTION TO BLOCKBURGER?

As its second argument the government urges that, even if the *Blockburger* test is not satisfied, the instant prosecution is not precluded on grounds of double jeopardy. Rather, the government contends, *Albernaz v. United States,* 450 U.S. 333 (1981), shows that the *Blockburger*

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[6] Defendant does not here argue, and thus the Court need not consider, whether such an order—in effect, an order "to obey the law"—is essentially redundant and cannot give rise to additional punishment beyond that prescribed by the legislature for the particular offense defendant is alleged to have committed.

test is not controlling where there is a clear legislative intent that the two offenses are to be treated as separate offenses. Such a clear legislative intent is present here, the Government urges:

> The objective of the contempt statute, D.C. Code § 11-944, is to preserve the authority of the court and the integrity of the judicial process. To that end the court was given the power to punish Dixon for his willful disregard in violating the conditions of his pretrial release. The objective of the legislature in treating as criminal, the possession of cocaine with intent to distribute, is clearly a different aim, namely to protect society from the immediate and far reaching evils that result from dispersing dangerous drugs in the community.

Government's Opposition to Defendant's Motion to Dismiss the Indictment on Grounds of Double Jeopardy at 3.

Assuming *arguendo* that the legislative objectives in the contempt and possession with intent to distribute statutes are different, does that fact permit multiple prosecutions (or multiple punishments) for offenses which are the same under *Blockburger*? There is some language in the *Albernaz* opinion which might initially be thought to support that proposition. Thus, in his opinion for the Court, Justice (now Chief Justice) Rehnquist declares that "[t]he *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz, supra,* 450 U.S. at 340.

This statement, however, must be read in the context of the holding in *Albernaz.* In that case, petitioners were convicted of conspiracy to import marijuana in violation of 21

U.S.C. § 963 and conspiracy to distribute marijuana in violation of 21 U.S.C. § 846. They received consecutive sentences for each offense. They argued on appeal that, since it was unclear whether Congress intended to authorize multiple punishment for violation of these two statutes in a case involving only a single agreement or conspiracy, the rule of lenity barred the imposition of multiple punishment and, alternatively, that such cumulative punishment was barred by the Double Jeopardy Clause.

The Supreme Court held that "[t]he statutory provisions at issue here clearly satisfy the rule announced in *Blockburger*" since " 'each provision requires proof of a fact [that] the other does not.' " 450 U.S. at 339. Moreover, the Court found that there was nothing in the legislative history to suggest that Congress meant to bar multiple punishment for violation of these two statutes, even if *Blockburger* did not. Accordingly, the Supreme Court affirmed the convictions and the consecutive sentences imposed.

Thus, *Albernaz* shows only that, even in a case where the *Blockburger* test *is* satisfied so that multiple punishment or prosecution would not normally be thought to constitute double jeopardy, the Court is willing to consider that such punishment may still be precluded by a clear showing that the legislature did not intend to permit such multiple punishment. The case certainly does not hold that multiple prosecution or punishment of offenses which *fail* the *Blockburger* test is nonetheless permissible if the legislature manifested a clear intention to authorize such multiple punishments. This is made plain by the concurring opinion of Justice Stewart who observes, "[n]o matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of *Blockburger v. United*

States, 284 U.S. 299." *Albernaz v. United States, supra,* 450 U.S. at 345 (Stewart, J., concurring).

IV. IS THE DOUBLE JEOPARDY CLAUSE APPLICABLE TO CONTEMPT PROCEEDINGS?

The most serious question presented by defendant's motion is whether the Double Jeopardy Clause is applicable at all in cases involving contempt prosecutions. In *Pearce, Brown, Blockburger, Albernaz,* and most other cases construing that clause, the defendant has faced multiple prosecutions or multiple punishments because of alleged commission of two or more ordinary criminal offenses. Are these principles equally applicable where the defendant is charged, on the one hand, with committing a particular criminal offense and, on the other hand, with contempt of court?

A. The Old Rule: Contempt Proceedings Do Not Implicate the Double Jeopardy Clause.

For some time it was thought in this country that the contempt power was so different from the power to prosecute for criminal offenses that the Double Jeopardy Clause was simply not implicated when the same conduct gave rise to both a contempt prosecution and a prosecution for commission of an ordinary crime. The three cases most frequently cited for this proposition are *In Re Chapman,* 166 U.S. 661 (1897); *Merchants' Stock and Grain Co. v. Board of Trade,* 201 F. 29 (8th Cir. 1912); and *O'Malley V. United States,* 128 F.2d 876 (8th Cir. 1942), *rev'd on other grounds sub nom. Pendergast v. United States,* 317 U.S. 412 (1943).

In *Chapman* defendant was prosecuted in the Supreme Court of the District of Columbia for violation of a statute making it a misdemeanor for any person to refuse to answer any pertinent question put to him as a witness before

either House of Congress. Following his conviction, Chapman filed a petition for a writ of habeas corpus, arguing that his incarceration was unlawful on various grounds. One of his arguments was that, since both Houses of Congress had the inherent power to punish by contempt any witness' refusal to testify before them, the statute which also made such conduct a criminal offense constituted an improper delegation of legislative authority and would violate the Double Jeopardy Clause if one were held in contempt and also prosecuted under the criminal statute.

Both the improper delegation and the double jeopardy argument were rejected by the Supreme Court. After concluding that the statute did not involve an improper delegation, Chief Justice Fuller's opinion for the Court declared:

> Nevertheless, although the power to punish for contempt still remains in each House, we must decline to decide that this law is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States, who are interested that the authority of neither of their departments, nor of any branch thereof, shall be defied and set at naught. It is improbable that in any case cumulative penalties would be imposed, whether by way of punishment merely, or of eliciting the answers desired, but it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offence, since the same act may be an offence against one jurisdiction and also an offence against another; and indictable statutory offences may be punished as such, while the offenders may likewise be subjected to punishment for the same acts

> as contempts, the two being *diverso intuitu* and capable of standing together.

166 U.S. at 672.

In *Merchants' Stock and Grain, supra,* the Chicago Board of Trade had obtained an injunction precluding the Merchants' Stock and Grain Company and certain individuals from using or distributing the Board's quotations without first lawfully obtaining the right to do so from the Board. Subsequently, the Board moved to hold Merchants' and the individuals in contempt for violating the injunction. The trial court appointed a special examiner to take evidence on the matter and render a report. Upon receipt of the report, the court held defendants in contempt and imposed a fine, part to be paid to the Board of Trade and part to the government.

On appeal defendants raised a number of arguments, particularly that reference to the special examiner violated their Sixth Amendment right to confront the witnesses against them. Acknowledging that the proceeding was for criminal rather than civil contempt, at least as to the portion of the fine paid to the government, the Court of Appeals nonetheless held that the normal constitutional protections afforded by the Fifth and Sixth Amendments were not available to defendants in a criminal contempt proceeding since "criminal contempts are tried summarily, and not in the regular course or way." 201 F. at 26. Thus, the Court indicated, there was no right to jury trial in such contempts, nor a right to seek a change of venue, nor a right to be present at the time of one's sentencing, nor a privilege against self incrimination. In the course of listing the various constitutional protections which were not available in contempt matters, the Court also stated:

> An act which is a contempt of court and also a crime may be punished both by the summary provision and by indictment, and neither will bar the other.

> In other words, the provision protecting him against being twice put in jeopardy does not protect him against being punished for contempt and under indictment for the same act. In view of these facts and others, it is not to be wondered that the Supreme Court has characterized contempt proceedings as sui generis. It will probably appear that there are a number of other cases in which provisions as to criminal cases and criminal prosecutions do not apply to criminal contempts.

201 F. at 27 (citations omitted).

Both of the above quoted passages, while certainly reflective of the predominant attitude toward contempt proceedings, are nevertheless dictum. In *Chapman,* no contempt proceeding was brought and the defendant was confronted with a single prosecution for violation of the misdemeanor statute. In *Merchants',* there was a criminal contempt proceeding, but no prosecution of any other sort was involved. However, in *O'Malley v. United States, supra,* both contempt proceedings and criminal prosecutions over the same conduct were present.

In *O'Malley* defendants carried out an elaborate scheme to obtain money from a District Court trust fund by presenting to the court evidence of fictitious settlements. After the fraud was discovered, the defendants were indicted for conspiracy to defraud the United States and endeavoring to obstruct justice. Before these cases proceeded to trial, the defendants entered an agreement with the United States Attorney to plead guilty to certain tax evasion charges. After a jury was sworn to try the conspiracy matters, the government entered a *nolle prosequi,* apparently because the defendants urged that their tax evasion pleas were part of an agreement under which the conspiracy charges would be dropped.

Subsequently, the District Court held the defendants in criminal contempt for the same conduct. On appeal the defendants challenged these contempt convictions on numerous grounds, including double jeopardy. The Court of Appeals rejected this contention:

> The nolle prosequi having been entered on the demand of the appellants, double jeopardy did not result, even if the indictments were for the same offenses as charged in the instant proceeding. Craig v. United States, 9 Cir., 81 F.2d 816. The charges in the indictments, however, were not the same as those involved in the instant proceeding. . . . Punishments for contempt of court and on conviction under indictment for the same acts are not within the protection of the constitutional inhibition against double jeopardy. Acts of misbehavior, though constituting violation of the criminal law, may also constitute contempt of court if committed in the presence of the court. Merchants' Stock & Grain Co. v. Board of Trade, 8 Cir., 201 F. 20. The plea of double jeopardy can not prevail.

128 F.2d at 684.

O'Malley, as will be noted, does involve multiple prosecutions, one for violation of general criminal statutes and one for criminal contempt. Moreover, the language quoted above appears to assert a broad principle that double jeopardy is not implicated by such multiple prosecutions. However, as the penultimate sentence notes, the contempt involved in *O'Malley* was held to have occurred "in the presence of the court." As will be noted *infra,* that circumstance presents a critical distinction between that case and the one at bar.

B. The Expansion of Defendants' Rights in Criminal Contempt Proceedings.

The assertion that contempt proceedings do not implicate the Double Jeopardy Clause must be placed in the historical context of a steady expansion of defendant's rights in certain kinds of contempt proceedings.

Originally, the Judiciary Act of 1789 codified the broad contempt power that had existed in English common law by establishing the courts and providing, in part, that those courts "shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ." ch. 20, § 17, 1 Stat. 73. However, after federal Judge James Peck used contempt to disbar and imprison a lawyer who wrote an article criticizing some of the judge's opinions, public concern about such abuses of discretion led to the Act of 1831 which limited the contempt power by providing,

> That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

ch. 99, § 1, 4 Stat. 487, 487-88. A similar limitation currently exists at 18 U.S.C. § 401 and is implemented by Federal Rule of Criminal Procedure 42.

That rule—and its substantially identical counterpart, Superior Court Rule of Criminal Procedure 42—distinguishes between summary and nonsummary contempt proceedings. Under Rule 42(a), a court may punish "summarily" for contemptuous conduct occurring in its presence. Rule 42(b), governing "nonsummary" contempt proceedings for conduct which occurs outside the court's presence, affords defendants significant due process protections in such proceedings. The rule reflects a judicial recognition of the need to provide greater due process rights to nonsummary contemnors. *See, e.g., Ex parte Terry,* 128 U.S. 289, 311 (1888) (distinguishing between procedures used for contempts that occur in the presence of the courts and contempt that occurs outside that presence).

In this century, a series of Supreme Court decisions have tended to "assimilate criminal contempt to ordinary crimes," *United States v. Rollerson,* 145 U.S. App. D.C. 338, 340, 449 F.2d. 1000, 1002 (1971), and have gradually augmented the list of rights deemed constitutionally applicable to nonsummary contempt proceedings.[7] Thus, by 1968, it was possible for the Supreme Court to accurately observe that "procedures in criminal contempt cases have come to mirror those in ordinary criminal cases." *Bloom v. Illinois,* 391 U.S. 194, 207 (1968). *See generally* Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury,* 73 Mich. L. Rev. 483,

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[7] *See, e.g., Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 444 (1911) (reasonable doubt standard); *Cooke v. United States,* 267 U.S. 517, 537 (1925) (notice, hearing, counsel, attendance of witness); *In re Oliver,* 333 U.S. 257 (1948) (public trial); *Offutt v. United States,* 348 U.S. 11 (1954) (unbiased judge); *Panico v. United States,* 375 U.S. 29 (1963) (insanity defense); *United States v. Barnett,* 376 U.S. 681 (1964) (jury trial); *Harris v. United States,* 382 U.S. 162 (1965) (notice and hearing); *Cheff v. Schnackenberg,* 384 U.S. 373 (1966) (jury trial); *Bloom v. Illinois,* 391 U.S. 194 (1968) (jury trial).

484-93 (1975). Although there have been some decisions prescribing the minimum due process standards which must be observed even in summary contempt cases,[8] the principal evolution in rights has concerned nonsummary proceedings.

C. The Present View: Double Jeopardy Is Still Not Implicated By Summary Contempt Proceedings.

Despite the expansion of defendant's rights with respect to nonsummary contempt, it is still generally held that the Double Jeopardy Clause is not violated if a defendant who has been found in summary contempt for certain conduct occurring in the courtroom is later prosecuted, on the basis of the same conduct, for committing a substantive criminal offense.

One of the leading cases of this kind is *United States v. Mirra*, 220 F.Supp. 361 (S.D.N.Y. 1963). Mirra, while under cross-examination, stood up, took the witness chair on which he had been sitting, and hurled it at the prosecutor. The trial judge summarily held him in contempt of court and sentenced him to imprisonment for one year. Subsequently he was indicted for armed assault on account of the same conduct. In a much cited opinion, District Judge Edelstein held that "a criminal prosecution arising out of and subsequent to summary contempt conviction does not offend the policy underlying the protection against Double Jeopardy." 220 F.Supp. at 366. This is because the defendant in such a situation is not subjected to successive trials, the contempt being imposed summarily and without any elaborate trial proceeding. Moreover, Judge Edelstein observed, the power of summary contempt is needed to assure orderly and dignified judicial proceedings.

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[8] *See generally Kuhns, The Summary Contempt Power: A Critique and a New Perspective*, 88 Yale L.J. 39 (1978).

A similar result was reached in *United States v. Rollerson*, 145 U.S. App. D.C. 338, 449 F.2d 1000 (1971). There defendant was found in summary contempt for throwing a water pitcher at a prosecutor during his trial for robbery. Later he was prosecuted for assault with a dangerous weapon and assault on a federal officer. Relying on the *Mirra* decision and the summary nature of the contempt proceedings under Rule 42(a), the Court of Appeals held that the later prosecution did not violate defendant's double jeopardy rights. Significantly, at the close of its opinion, the Court said "[i]n this case we do not decide whether the Double Jeopardy Clause would bar a criminal prosecution following a separate contempt hearing pursuant to Rule 42(b), Fed.R.Crim.P." 145 U.S. App. D.C. at 343, 449 F.2d at 1005 n. 13.

Similarly, in *People v. Totten*, 118 Ill. 2d 124, 514 N.E.2d 959 (Ill. 1987), the defendant in a criminal case, at sentencing, hit the prosecutor. The judge, seeing this, held him in summary ("direct") contempt and sentenced him to six months in prison. Relying on the summary nature of that proceeding, and citing *Mirra* and *Rollerson*, the Supreme Court of Illinois held that the summary contempt conviction did not pose a double jeopardy impediment to the defendant's later prosecution for aggravated battery concerning the same episode.

In *Marangelo v. Criminal Court*, 49 Misc.2d 414, 267 N.Y.S.2d 791 (N.Y. Sup. Ct. 1966), a summary contempt conviction for refusal to testify before a grand jury was held not to present a double jeopardy obstacle to a subsequent prosecution for conspiracy.

In *Maples v. State*, 565 S.W.2d 202 (Tenn. 1978), defendant was held in summary contempt and fined as a result of admittedly fraudulent divorce proceedings. Subsequently, he was prosecuted for perjury concerning the same acts. His double jeopardy argument against the later

prosecution was rejected by the Supreme Court of Tennessee in an opinion emphasizing the summary nature of the earlier contempt proceeding against him.

Finally, in *State v. Warren,* 186 N.J.Super. 35, 451 A.2d 197 (N.J. Super. Ct. Law Div. 1982), defendants refused to answer questions at murder trials after being ordered to do so. They were held in summary contempt and sentenced to six months. Later they were indicted for hindering a prosecution. Their double jeopardy argument against the subsequent prosecution was rejected on grounds that the initial convictions resulted from summary proceedings and thus they were not threatened with successive trials.

In all of these cases, the two offenses involved in the successive prosecutions failed the *Blockburger* test, *i.e.*, it could not be said that each provision required proof of a fact which the other did not. However, because the conduct in the contempt matter occurred in the courtroom before the eyes of the sentencing judge and no successive trial was involved, principles of double jeopardy were held not to be violated by the subsequent criminal prosecution.

D. The Emerging View that Double Jeopardy Protection Does Apply To Non-Summary Contempt Proceedings.

In contrast to summary contempt cases, double jeopardy considerations are quite different when a defendant is convicted of criminal contempt via a non-summary hearing or trial. In such circumstances the issue of successive trials, which is at the heart of the Double Jeopardy Clause, is directly implicated. Thus, virtually all of the courts that have considered this matter in the last fifteen years have held that double jeopardy principles do preclude successive prosecutions—one for non-summary contempt and the other for violation of ordinary criminal statutes—for the same conduct.

The first intimations of this view were expressed by the Supreme Court in *Colombo v. New York,* 405 U.S. 9 (1972). There defendant refused to answer questions before a grand jury despite a grant of immunity. The trial court ordered him to do so and he refused. After giving the defendant a week to change his mind, the trial court held him in "criminal contempt" and sentenced him to pay a $250 fine and serve thirty days in jail. Later defendant was indicted for contumacious and unlawful refusal to answer legal and proper interrogatories in violation of New York Penal Law Section 600. His double jeopardy argument was rejected by the New York Court of Appeals on grounds that the contempt was really civil in nature and that it concerned one act (refusal to testify before the grand jury) while the indictment concerned another act (refusal to obey the order of the trial judge).

On writ of certiorari, the Supreme Court reversed in a brief *per curiam* opinion. The Court held that the contempt was truly criminal in nature since defendant had been sentenced to a definite term in jail and a fixed fine. It also noted that there was some confusion in the record as to whether the contempt and the indictment concerned the same act. Implying that if they did, double jeopardy would bar the indictment, the Supreme Court remanded to the New York Court of Appeals "to reconsider the validity of the indictment under the Double Jeopardy Clause of the Constitution." 405 U.S. at 11. On remand the New York Court of Appeals determined that the indictment did involve the same offense as the contempt conviction and the indictment was dismissed. *People v. Colombo,* 31 N.Y. 947, 293 N.E.2d 247 (N.Y. 1972).[9] *Accord, Menna v. New York,* 423 U.S. 61 (1975).

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[9] Since the contempt in *Colombo* apparently occurred in the presence of the court, *i.e.*, a refusal to obey an order to testify, and

A very similar result was reached in *People v. Lombardo*, 50 Cal. App. 3d 849, 123 Cal. Rptr. 755 (Cal. Ct. App. 1975), where, despite a grant of immunity, a witness refused to testify at trial and was held in criminal contempt and sentenced to a $500 fine plus five days in jail. Thereafter he was charged with a violation of Section 166 of the Penal Code—willfully and unlawfully refusing to answer material questions after being sworn as a witness and having been granted immunity. His plea of former jeopardy was denied and he was convicted and sentenced to six months and a $500 fine, but given credit for time previously served and the amount of the fine previously paid on the contempt order. Without considering that the original contempt action was apparently a summary one, the California Court of Appeals reversed the conviction on double jeopardy grounds, relying on the Supreme Court opinion in *Colombo*.

Perhaps the first case to squarely apply the Double Jeopardy Clause to non-summary contempt proceedings is *United States v. Gypsum Company*, 404 F.Supp. 619 (D.D.C. 1975). There defendants were tried and convicted of price-fixing following a four month trial in Pittsburgh. Thereafter the government sought to have the same defendants tried for criminal contempt for allegedly violating a 1951 consent decree filed in the District of Columbia. The indictment and the contempt petition were filed on the same day and the substantive allegations in each were virtually identical. Judge Barrington Parker granted the defendants' motion to dismiss the contempt proceeding on double jeopardy grounds. He noted that under *Block-*

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was dealt with essentially summarily, it would appear the the matter might have been exempted from the reach of the Double Jeopardy Clause on these grounds. However, neither the Supreme Court nor the New York Court of Appeals considered this possibility.

burger the offenses involved in the contempt case and the price-fixing case were the same. He dismissed the government's assertion that "contempt proceedings are not subject to the usual rules of double jeopardy" by noting that all of the cases cited by the government involved courtroom incidents wherein assaultive conduct was met with summary contempts, contrasting this with the lengthy second trial which would be imposed on defendants in this case. 404 F.Supp. at 623. He also rejected the government's contention that, since contempt is an offense against the judiciary, while substantive crimes are offenses against a legislative command, these proceedings involved separate jurisdictions. He observed that the "separate jurisdiction theory" had traditionally been applied where prosecutions were sought by both state and federal governments and concluded that this principle was grounded in considerations of federalism not present when the United States government pursued the defendants in two federal courts for both contempt of court and violations of the Sherman Act.[10]

Two years later the Supreme Court of Illinois reached a similar result in *People v. Gray*, 69 Ill. 2d 44, 370 N.E.2d 797 (Ill. 1977), *cert. denied*, 435 U.S. 1013 (1978). Gray was held in criminal contempt, following an emergency hearing, for violating a protective order entered in a divorce proceeding which enjoined him from striking or molesting his wife. The court found that defendant had struck his wife with a gun and then shot her. He was sentenced to six months for this contempt. Subsequently he

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[10] In *Gypsum*, Judge Parker assumed—without considering—that the Double Jeopardy Clause applies to corporate defendants in the same way as to natural persons. This is probably correct. *See United States v. Hospital Monteflores, Inc.*, 575 F.2d 332 (1st Cir. 1978); *United States v. Security National Bank*, 546 F.2d 492 (2nd Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

was prosecuted and convicted of aggravated battery and attempted murder of his wife based on the same conduct. Citing *Blockburger* and *Brown v. Ohio*, the Illinois Supreme Court concluded that defendant's subsequent prosecution violated his double jeopardy rights. The Court decided that the offenses involved in the two prosecutions were the same because the evidence needed to prove each would be substantially the same.[11]

The next significant opinion in this line is *United States v. Haggerty*, 528 F.Supp. 1286 (D.Colo. 1981), in which air traffic controllers were convicted of criminal contempt for violating a court order that they not engage in a strike. Later they were indicted for violating the provisions of the United States Code which make striking by federal employees a crime. In a lengthy opinion, District Judge Kane reviewed the applicable authorities, including *Blockburger, Colombo, Gypsum, Gray*, and *Rollerson*, and concluded,

> Finally, to my knowledge, every court which has addressed the issue has held that where a court order which forms the basis for a criminal contempt conviction includes a prohibition against committing a substantive offense, successive prosecutions for both criminal contempt and for the substantive offense violate the double jeopardy clause.

528 F.Supp. at 1299.

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[11] In *People v. Totten*, 118 Ill. 2d 124, 514 N.E.2d 959 (Ill. 1987), the Illinois Supreme Court overruled the *Gray* decision to the extent that it used "the same evidence test" to determine whether the two offenses were the same. However, the Court made clear that an "indirect" (i.e., non-summary) contempt conviction would bar a subsequent prosecution concerning the same matter unless, as required by *Blockburger*, each conviction required proof of a fact which the other did not. 118 Ill. 2d at 39, 514 N.E. 2d at 965.

Accordingly, the Court granted the defendants' motion to dismiss the indictment.

Yarbro v. State, 402 So. 2d 599 (Fla. Dist. Ct. App. 1981), involved a defendant found in criminal contempt for perjury during a divorce trial and sentenced to 179 days. Later the defendant was charged by information with perjury for the same statements. Concluding that the offenses in the two cases were the same under *Blockburger*, the Florida Appellate Court determined that the Double Jeopardy Clause precluded the subsequent perjury protection.

In *Commonwealth v. Allen*, 322 Pa. Super. 424, 469 A.2d 1063 (Pa.Super. 1983) *aff'd in part and rev'd in part*, 506 Pa. 500, 486 A.2d 363 (Pa. 1984), *cert. denied*, 474 842 (1985), orders were entered enjoining defendant from physically abusing, striking or harrassing his wife and minor children. Following a hearing, defendant was found in contempt of this order for entering his wife's residence and hitting her. He was fined $750. Later he was indicted for simple assault, trespass and rape in connection with the same conduct. In a thorough opinion discussing *Blockburger, Gray, Gypsum, Haggerty* and other cases, the Court held that the assault prosecution was barred by double jeopardy but that trespass and rape were not since those offenses required proof of facts additional to those which were necessary to secure the contempt conviction. 469 A.2d at 1069.

Finally, *State v. Thompson*, 294 Or. 528, 659 P.2d 383 (Or. 1983), is an *en banc* opinion of the Supreme Court of Oregon authored by Justice Hans Linde, a respected constitutional scholar. Thompson had been convicted and fined for contempt for violating an injunction, entered in a property dispute, prohibiting him from entering upon his neighbor's land. This conviction for indirect contempt was held by the Oregon Supreme Court to bar a subsequent prosecution for criminal trespass concerning the

same conduct. Although the decision is purportedly based on Oregon statutory law concerning double jeopardy, the opinion implies that the Double Jeopardy Clause of the Fifth Amendment would require the same result, since the contempt conviction was not the result of a summary proceeding.

> Recent cases from other jurisdictions are in accord that an indirect criminal contempt proceeding bars on double jeopardy grounds a subsequent criminal prosecution based on the same facts. *See, e.g., United States v. Haggerty,* 528 F.Supp. 1286, 1296-1300 (D.Colo. 1981) (strike against government); *United States v. U.S. Gypsum Co.,* 404 F.Supp. 619, 622-23 (D.D.C. 1975) (price fixing); *Simanonok v. Randle,* 388 So.2d 45 (Fla.App. 1980) (refusal to connect sewer); *People v. Gray, supra* (shooting wife). Courts have permitted a subsequent criminal prosecution only when the criminal contempt conviction was direct and summary. *See, e.g., United States v. Rollerson,* 145 U.S.App.D.C. 338, 449 F.2d 1000 (1971) (assault on federal officer); *O'Malley v. United States,* 128 F.2d 676, 684 (8th Cir. 1942), *rev'd on other grounds* 317 U.S. 412, 63 S.Ct. 268, 87 L.Ed. 368 (1943) (conspiracy to obstruct justice); *United States v. Mirra,* 220 F.Supp. 361 (S.D.N.Y. 1963) (assault on prosecutor); *Maples v. State,* 565 S.W.2d 202 (Tenn. 1978) (perjury).

294 Or. at 532, 659 P.2d at 387 n. 5.

E. Current State of the Law Assessed.

The foregoing review of authorities might suggest a summing up along the following lines: For some time it was thought in this country that contempt proceedings were *sui generis,* or at least quite different from ordinary

criminal prosecutions, and that they did not implicate the protections afforded by the Double Jeopardy Clause. In recent years, however, a number of decisions have made clear that non-summary contempt proceedings—that is, separate trials for conduct which occurred outside the presence of the court—are essentially equivalent to criminal prosecutions and that defendants in such proceedings are thus entitled to the same protections afforded defendants in ordinary criminal cases. Thus, the modern view is that double jeopardy principles do apply to non-summary contempt proceedings but not to summary contempts, since the latter do not pose the dangers of successive trials to which the Double Jeopardy Clause is addressed.

The foregoing description of the law, while neat and clean, has two problems.

First, there are some reported decisions which do not appear to conform to the description. While there is no reason to expect a totally harmonious and consistent pattern of cases on this aspect of constitutional law, which the Supreme Court has yet to settle definitively, it is worth asking whether the discordant cases suggest a need to re-examine the hypothesis. On reflection, this Court thinks that such re-examination is not required, since many of the apparently abberant cases can properly be explained in other ways. Some of the cases which decline to apply double jeopardy principles to contempt matters involve civil, not criminal, contempt.[12] In other cases, the offenses involved in the contempt matter and the criminal prosecution are simply not the same under *Blockburger.*[13] Some

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[12] See, for example, *United States v. Anderson,* 577 F.Supp. 223, 230 (D.Wyo. 1983).

[13] See, for example, *People v. Gardner,* 118 Ill. 2d 124, 514 N.E.2d 959 (Ill. 1987); *United States v. Garcia-Pupo,* 845 F.2d 8 (1st Cir.

of the cases are older ones which preceeded the recent expansion of defendants' rights in non-summary contempt proceedings.[14] Some of the cases are simply unpersuasive since they fail to cite *Blockburger* or any of the leading cases and involve no reasoning whatever.[15]

The second difficulty with the proposed "summing up" is that it is not really accurate to say that summary contempt proceedings do not infringe the concerns embodied in the Double Jeopardy Clause. Although such proceedings do not involve successive trials, they *do* involve multiple punishments if the same conduct gives rise to both a summary contempt sentence and a sentence for committing a substantive criminal offense. Moreover, the double jeopardy problem cannot be avoided by giving a defendant "credit" on one sentence for time served on the other, as some courts have attempted to do. *See, People v. Lombardo, supra*, 50 Cal. App. 3d 849, 123 Cal. Rptr. 755 (Cal. Ct. App. 1975); *Marangelo v. Criminal Court, supra*, 49 Misc. 2d 414, 267 N.Y.S. 2d 791 (N.Y. Sup. Ct. 1966) (citing § 602 of the New York Penal Law). The Supreme Court has made clear that, where double jeopardy applies, the clause precludes a second conviction even if no additional punishment attaches to that conviction since "[t]he separate *conviction* . . . has potential adverse collateral consequences that may not be ignored." *Ball v.*

1988); *People v. Barry*, 153 Cal. App. 2d 193, 314 P.2d 531 (Cal. Dist. Ct. App. 1957), *cert. denied* 355 U.S. 956 (1957); and *In Re Amato*, 204 Misc. 454, 124 N.Y.S.2d 726 (1953).

[14] *Long v. Commonwealth*, 177 Ky. 391, 197 S.W. 843 (Ky. 1917); *Ivy v. State*, 26 Okla. Crim. 184, 223 P. 401 (Okla. Crim. App. 1924); *Dolan v. Commonwealth*, 304 Mass. 325, 23 N.E.2d 904 (Mass. 1939).

[15] *Darrowman v. State*, 214 Tenn. 408, 381 S.W.2d 251 (Tenn. 1964); *Church v. State*, 239 Miss. 1, 111 So.2d 228 (Miss. 1959); *Nicholas v. Commonwealth*, 186 Va. 986, 45 S.E.2d 305 (Va. 1947).

United States, 470 U.S. 856, 865 (1985) (emphasis in original).

The refusal to apply the Double Jeopardy Clause to cases involving summary contempt convictions is sometimes justified on grounds that, when a criminal offense is committed in the courtroom, in the presence of a judge, there is an added degree of infamy not present when the offense occurs in the outside world. Frankly, to this judge, it is hard to see why assault on a prosecutor in court during trial is any more deserving of enhanced punishment than is assault on a priest in a cathedral during mass or assault on a surgeon in a hospital during open heart surgery. In any event, if there is something specially heinous about criminal offenses being committed in courtrooms, that is an argument for modifying the statutory provisions so as to authorize longer sentences when the offenses are commited in court. It is not an argument justifying multiple punishments through both contempt and ordinary criminal sentences.

The other argument sometimes advanced for not applying double jeopardy principles to summary contempts is that of necessity, *i.e.*, courts need the power to immediately terminate conduct which is impeding their proceedings. While the need for such power is undoubted, it does not follow that such power requires an invasion of rights normally secured by the prohibition against double jeopardy. There are, after all, other ways to quell courtroom disturbances than through imposition of a summary contempt conviction. For example, in many instances, the person disturbing court proceedings may be sufficiently chastened and deterred by simply advising him that the court is now ordering him to show cause, at a subsequent, non-summary proceeding, why he should not be held in criminal contempt. If someone in the courtroom is particularly recalcitrant, the court can always invoke its civil

contempt authority and incarcerate the individual until he purges himself by becoming orderly. Finally, in an extreme case, if it is necessary to impose a summary contempt conviction, a court may, of course do so, but, arguably, with the understanding such a conviction would bar the imposition of further punishment through a later criminal punishment for the same conduct.

V. CONCLUSION

Whatever may be the validity of the rule that the Double Jeopardy Clause is not implicated by summary contempt proceedings, this Court is satisfied that the policies underlying that clause, the guiding Supreme Court decisions on that matter, and the growing body of case law[16] discussed above compel the conclusion that double jeopardy principles *are* implicated by criminal contempt convictions resulting from non-summary proceedings and that such a conviction bars a subsequent criminal prosection if both cases involve the same offense under the *Blockburger* test.[17] Accordingly, since, as determined in Section II

[16] It appears that British courts, who are also beneficiaries of the Magna Carta legacy, have reached the same conclusion. *See Double Jeopardy and Committal for Contempt*, 48 *Journal of Criminal Law* 140, 140-142 (May 1984).

[17] A similar conclusion was reached by Judge Beaudin in *United States v. Jackson*, 113 Wash.L.Rep. 2437 (D.C. Super. Ct. 1985). There, Jackson failed to appear for a status hearing in a theft case. When he was brought before the court, there was a brief proceeding during which he was asked why he had not appeared. Finding his answer insufficient, Judge Beaudin held him in contempt for violating the release order that required him to return to court for all further proceedings; Jackson was then sentenced to three days in jail. Subsequently, the government sought to prosecute him for the substantive offense of failure to appear in violation of D.C. Code § 23-1327(a). Although it appears that the contempt conviction may have resulted from a summary proceeding, Judge Beaudin nonetheless dismissed the

supra, the instant prosecution and the prior non-summary contempt trial before Judge Walton involve the same offense under *Blockburger*, this Court holds that the instant prosecution is barred by the Double Jeopardy Clause.

In closing, it is worth making clear what this Court has *not* held in this opinion.

First, the Court is not holding that defendant's double jeopardy rights were violated when Judge Walton determined to modify defendant's release conditions following his rearrest in the drug case. That question was not presented by the instant motion. However, since a bond determination may be based on, *inter alia*, incentives for flight deriving from an increased collection of pending cases, D.C. Code § 23-1321(b), there would appear to be no double jeopardy infringement if defendant's bond were increased in the murder case due to the drug arrest and he were subsequently tried for the drug case itself.

Second, nothing in this opinion suggests that the Double Jeopardy Clause would be violated if a court holds a hearing and finds that a defendant has violated conditions of his release—*e.g.*, reporting to Pretrial Services for drug testing, living at a particular address, staying away from certain witnesses, obeying a curfew, etc.—which do not themselves constitute criminal offenses. This opinion is concerned only with a violation of the release condition which requires defendant to "refrain from committing any criminal offense" and a subsequent prosecution for the exact offense which is alleged to have constituted the contempt.

Third, this Court is not deciding what impact the relative sentences available for the contempt and the underlying criminal offense might have on any double

failure to appear information in a thorough opinion which concluded that the Double Jeopardy Clause does apply to contempt convictions.

jeopardy, or perhaps due process, considerations. In this case, for example, Judge Walton sentenced defendant to six months for his contempt in violating the release order, whereas possession with intent to distribute cocaine while on pretrial release ordinarily carries a maximum sentence of ten years. D.C. Code §§ 23-1328(a)(1) and 33-541(a)(2)(B). However, not all criminal offenses carry sentences greater than the six months allowed by D.C. Code § 23-1329(a) for violating a condition of pretrial release. Thus, for example, different questions might be presented where a trial court found that a defendant had violated the release condition of refraining from criminal conduct by possessing drug paraphernalia and sentenced such a defendant to six months for contempt, although possession of drug paraphernalia is ordinarily punishable by only thirty days. *See* D.C. Code § 33-603(a). Indeed, where defendant is afforded a right to jury trial, criminal contempt can be punished by up to a life sentence. *See In re Neal*, 475 A.2d 390, 393 (D.C. 1984) ("trial judge has broad discretion imposing sentence for criminal contempt"); *Warring v. Huff*, 79 U.S. App. D.C. 302, 303, 122 F.2d 641, 642, *cert. denied*, 314 U.S. 678 (1941) ("the contempt statute sets no maximum, not even an indefinite one such as life; the maximum is the non-arbitrary discretion of the trial judge"). *Cf.* D.C. Code § 16-705. Consequently, in some circumstances, a conviction following a jury trial for contempt consisting of criminal conduct could expose the defendant to a sentence vastly greater than that which the legislature has prescribed for the underlying criminal offense itself.

The Court is aware that its decision may pose some difficult questions regarding the interaction of judges and prosecutors in initiating criminal proceedings. Thus, where a judge issues an order to show cause and seeks to proceed with a nonsummary contempt hearing involving a

matter such as confronted Judge Walton, the United States Attorney may ask the judge to defer that proceeding, since the holding of such a contempt hearing would preclude the defendant from being tried for the underlying offense. In most—but perhaps not all—instances, it would seem appropriate to accomodate that request and give the government a reasonable opportunity to prosecute the substantive offense. Such accommodations do not seem significantly more difficult than those now followed in this Court where probation revocation is sought on grounds of a rearrest. There, the probation judge traditionally awaits the outcome of the new case, and defendant's probation continues without revocation, absent "technical" violations. In cases of a new arrest while on pretrial release, the Court has greater power—it can modify the defendant's bond without awaiting resolution of the rearrest case.

Accordingly, for all the reasons set forth above, this Court holds that the instant prosecution is barred by the Double Jeopardy Clause. Thus, *defendant's Motion to Dismiss is granted, and it is hereby Ordered that the Indictment is dismissed with prejudice.*

Date: September 26, 1988

Curtis E. von Kann

CURTIS E. VON KANN
Judge

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APPENDIX D

DISTRICT OF COLUMBIA
COURT OF APPEALS

CR F-442-88

UNITED STATES, APPELLANT

v.

ALVIN J. DIXON, APPELLEE

CR F-8415-88

MICHAEL FOSTER, APPELLANT

v.

UNITED STATES, APPELLEE

[FILED OCT. 31, 1991]

On Appeal from the Superior Court of
the District of Columbia
Criminal Division

On Rehearing En Banc

BEFORE: Rogers, Chief Judge, Ferren, Terry, Steadman and Schwelb, Associate Judges, and Newman* and Belson,** Senior Judges.

---

* Judge Newman was an Associate Judge of the court at the time of argument. His status changed to Senior Judge on March 11, 1991.

** Judge Belson was an Associate Judge of the court at the time of argument. His status changed to Senior Judge on July 24, 1991.

JUDGMENT

This cause came on to be heard on the transcript of record, the briefs filed, and was argued by counsel. On consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED by this court that the judgment as to Dixon (#88-1375) is affirmed and the judgment as to Foster (#89-449) is reversed.

For the Court:

/s/ Richard B. Hoffman
RICHARD B. HOFFMAN
Clerk

Opinion per Associate Judge John A. Terry.
Dated: October 31, 1991.

U.S. GOVERNMENT PRINTING OFFICE: 1991—312-324/45274

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON, RESPONDENT

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause precludes the government from prosecuting respondents for offenses for which they have already been convicted in non-summary criminal contempt trials?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON, RESPONDENT

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

Respondents, Alvin J. Dixon and Michael Foster, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Court of Appeals judgment in these consolidated cases. The en banc decision of the District of Columbia Court of Appeals is reported at 598 A.2d 724.

STATEMENT OF THE CASE

Both respondents were convicted of criminal contempt in non-summary proceedings at which the prosecution alleged and proved violations of the criminal law.

Dixon. Following his arrest on a charge of murder, respondent Dixon was released on bond pursuant to a court order which required him to "refrain from committing any criminal offense." 598 A.2d at 728. Dixon was subsequently arrested and

indicted for possession of cocaine with intent to distribute, in violation of D.C. Code § 33-541(a)(1) (1988). He was then ordered to "show cause why he should not be held in contempt" for violating the condition of his release order requiring him to "refrain from committing any criminal offense ..." 598 A.2d at 728. Following a full-fledged criminal trial at which the government proved through the testimony of four police officers that respondent Dixon had possessed cocaine with intent to distribute on January 15, 1988, he was found guilty of criminal contempt and sentenced to 180 days in jail.

Dixon then moved to dismiss the indictment charging him with possession with intent to distribute, claiming that prosecution on that charge was barred by the Double Jeopardy Clause. That motion was granted and the indictment ordered dismissed with prejudice. Following a government appeal, the Court of Appeals sitting en banc affirmed the dismissal in a unanimous decision. The Court of Appeals mandate issued on November 22, 1991.

Foster. Respondent Foster, like respondent Dixon, was subject to a court order that required him not to commit specific criminal offenses. A civil protection order directed that he "shall not molest, assault, or in any manner threaten or physically abuse" his wife. 598 A.2d at 725. Based on allegations that he had violated the prohibitions set forth in the civil protection order by inter alia grabbing his wife and throwing her against a car on November 6, 1987, throwing her down a flight of stairs on May 21, 1988, and making threats against

her on numerous occasions, including November 12, 1987, March 26, 1988, and May 17, 1988, id. at 726, Foster was prosecuted for criminal contempt for violating the civil protection order. The contempt proceeding was a full-fledged criminal trial that lasted three days and during which eight witnesses testified for the prosecution. The prosecution was conducted by the attorney who had represented Mr. Foster's wife in the civil protection order proceedings. At the conclusion of the trial, Foster was found guilty of four counts of contempt, including the November 6, 1987 and May 21, 1988, assaults, but was acquitted of all remaining counts, including those involving threats allegedly made by him on November 12, March 26 and May 17. He was sentenced to consecutive 150-day terms of imprisonment on each of the four counts.

Before the contempt trial, Foster was charged with assault with intent to kill, D.C. Code § 22-501 (1989), based on the May 21, 1988 assault on his wife, one of the incidents for which he was adjudicated in criminal contempt. He was subsequently indicted for that offense and for one count of simple assault alleged to have occurred on November 6, D.C. Code § 22-504 (1989), and for three counts of threats to injure a person, alleged to have occurred on November 12, March 26 and May 17, D.C. Code § 22-2307 (1989). All of the offenses for which he was indicted were offenses for which he had either been convicted or acquitted at the contempt trial. Foster's motion to dismiss on grounds of double jeopardy and collateral estoppel was denied by

the trial court and he appealed. The Court of Appeals decision reversed the trial court's order denying his motion to dismiss the indictment. The Court of Appeals mandate issued on November 22, 1991 and, on January 17, 1992, the indictment was dismissed with prejudice.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Because Both Indictments Have Been Dismissed With Prejudice After Petitioner Failed To Obtain A Stay Of Mandate From The Court Of Appeals, There Is No Live Case Or Controversy

Whether or not the question raised by this petition warrants this Court's review, these cases do not present an appropriate vehicle for addressing that question, since there remains no live case or controversy.

Following the decision by the District of Columbia Court of Appeals, the government did not seek a stay of mandate from the Court of Appeals. On November 22, 1991, therefore, the mandate issued from the Court of Appeals and each of these cases was remanded to the trial court for execution of the mandate. In the case of respondent Dixon, issuance of the mandate simply made final the trial court's prior order dismissing with prejudice the indictment against him.[1] In the case of respondent Foster, the trial court executed the mandate and dismissed all counts of the indictment against him, with prejudice. On February 6, 1992, the

[1]The statute that authorizes the government to take an appeal from an order dismissing an indictment, D.C. Code § 23-104(c), means, in effect, that such an order is not final until the order is affirmed on appeal and the mandate has issued.

trial court denied the government's motion for reconsideration of that order, noting that "[t]he government has not presented, nor is this Court aware of any authority permitting this Court to take any action other than that mandated by the Court of Appeals decision." February 6, 1992 Order at 1.[2] Because both indictments have been dismissed with prejudice, there no longer appears to be a live case or controversy between petitioner and these respondents.

Should the Court grant the petition, any decision rendered would be purely advisory in nature. See generally Preiser v. Newkirk, 422 U.S. 395, 401 (1975); Mills v. Green, 159 U.S. 651, 653 (1895). Indeed, in its memorandum in support of reconsideration, filed in the trial court, petitioner appeared to concede that dismissal of the indictment would preclude review by this Court. See Government's Motion To Reconsider Dismissal of Indictment at 2 (arguing that the trial court should reconsider its ruling because "[a] lower court may not in effect preclude the Supreme Court from reviewing a lower court decision by dismissing the case before a timely petition for certiorari is filed and acted upon").

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[2]The pendency of its motion for reconsideration of the trial court's ruling is cited by petitioner as reason why there remained a live case or controversy.

Petitioner has appealed the trial court's order dismissing the indictment against Mr. Foster with prejudice. However, the government's appeal -- which can only address the validity of the trial court's dismissal on remand from the Court of Appeals -- cannot serve to revive the underlying controversy that was terminated by that dismissal.

The only authority cited by petitioner for the existence of a live case or controversy is United States v. Villamonte-Marquez, 462 U.S. 579, 581 n.2 (1983). Petitioner's reliance on Villamonte-Marquez is misplaced, however. Respondents in Villamonte-Marquez were convicted of various drug offenses after the District Court denied their motion to suppress marijuana seized from their boat by Customs officials. The Court of Appeals held that the evidence should have been suppressed and reversed their convictions. Following issuance of the mandate, the government dismissed the underlying indictment pursuant to Fed. R. Civ. Pro. 48(a). In holding that there remained a live controversy in that case, notwithstanding dismissal of the indictments, this Court relied on the well-established principle that an indictment merged with a subsequent conviction. 462 U.S. at 581 n.2 (citing United States v. Morrison, 429 U.S. 1 (1976) (per curiam)). See also United States v. R.L.C., 60 U.S.L.W. 4234, 4236 (March 24, 1992) (possibility of reimposing original sentence originally saved the case from mootness, notwithstanding government's failure to seek stay of mandate). In these cases, respondents have not been convicted and there is therefore no judgment into which the dismissed indictments could merge.

Had the Court in Villamonte-Marquez wished to adopt the position apparently advocated by petitioner in this case -- that the Court has the power simply to reinstate an indictment -- it would have had no need to undertake its lengthy mootness analysis. Petitioner cites no authority for the proposition that

the Court can simply reinstate an indictment dismissed with prejudice, where that indictment has not resulted in a conviction.

Moreover, as petitioner recently argued to this Court in its brief in opposition in Republic National Bank of Miami, No. 91-767, cert. granted, 112 S.Ct. 1159 (February 24, 1992), its "failure to take the minimal steps necessary to seek a stay pending appeal undermines its claim to discretionary review by this Court." Brief for the United States in Opposition at 11.[3]

II. Certiorari Should Not Be Granted Because The Decision Of The Court Of Appeals Correctly Reflects The Modern Law Of Criminal Contempt And Double Jeopardy

In the view of respondents, the petition raise two related issues. The first is whether there is an exception to the protection afforded by the Double Jeopardy Clause in successive prosecution cases in cases involving prosecutions for non-summary contempt. By insisting that principles of double jeopardy do not apply to non-summary criminal contempt, however, petitioner relies on an outmoded view of criminal contempt, a view that refuses to consider contempt "a crime in the ordinary sense." Bloom v. Illinois, 391 U.S. at 201. The law of criminal contempt, as it has evolved in this Court in recent years, is fundamentally inconsistent with the existence of a "contempt

[3]Obviously, issuance of the mandate, without more, does not deprive this Court of jurisdiction. Rather, it is subsequent events, namely, the dismissals of the indictments with prejudice, that eliminates any live case or controversy.

exception." The issue then becomes solely one of the proper application of double jeopardy principles to facts of these cases. Application of those principles to these cases is not a difficult task, as the Court of Appeals recognized: Because the government must prove "conduct that constitutes an offense for which the defendant has already been prosecuted," Grady v. Corbin, 110 S.Ct. 2084, 2093 (1990), or, put another way, because the substantive criminal offense is a "'species of lesser included offense,'" United States v. Felix, 60 U.S.L.W. 4259, 4262 (March 25, 1992) (quoting Illinois v. Vitale, 447 U.S. 410, 420 (1980)), of the contempt for which respondents have already been prosecuted, the Double Jeopardy Clause necessarily bars second prosecutions.

A. Non-Summary Criminal Contempt Is Now Recognized As "A Crime In The Ordinary Sense"

Petitioner's primary argument in support of review of the en banc decision of the Court of Appeals is that it is out of step with decisions which have approved successive prosecutions for criminal contempt and substantive criminal violations. However, this view is inconsistent with this Court's decisions in Menna v. New York, 423 U.S. 61 (1975) (per curiam), and Columbo v. New York, 405 U.S. 9 (1972) (per curiam), as well as decisions that have extended full constitutional protections to persons charged with non-summary criminal contempt.

In Columbo, the defendant was held in contempt for refusing a court order to testify before a grand jury, following a grant

of immunity. He was later indicted for his "refusal to answer legal and proper interrogatories," an offense under the New York Penal Law. 405 U.S. at 10. The trial court dismissed the indictment on double jeopardy grounds, but its decision was reversed, based on the appellate court's conclusion that the defendant was held in civil, rather than criminal contempt. Id. The Supreme Court vacated the decision and remanded the case to afford the state court "the opportunity to reconsider the validity of the indictment under the Double Jeopardy Clause of the Constitution." Id. at 11. The remand in Columbo presupposes that principles of double jeopardy are applicable to contempt prosecutions.

Similarly, this Court's opinion in Menna v. New York, 423 U.S. 61 (1975) (per curiam), supports application of principles of double jeopardy to successive prosecutions for criminal contempt and substantive criminal offenses. As in Columbo, the defendant in Menna refused to testify before a grand jury after a grant of immunity. He then refused to obey a court order directing him to testify. He was first held in contempt for refusing to obey the court order, then indicted for refusing to answer the grand jury's questions. After his motion to dismiss the indictment on double jeopardy grounds was denied, he pled guilty. 423 U.S. at 61.

This Court held that the guilty plea did not waive the double jeopardy claim and remanded for a determination of the merits of that claim. 423 U.S. at 62-63. The Court noted that

> [t]he State concedes that petitioner's double jeopardy claim is a strong one on the merits. In light of the flat 30-day sentence imposed, the earlier contempt adjudication was a criminal conviction ... and New York law supports the proposition that the earlier conviction was based, at least in part, on the failure to answer questions ... and was thus for the same crime as the one charged in the instant indictment.

Id. at 62 n.1 (citations omitted).[4]

Petitioner's reliance on In re Debs, 158 U.S. 546 (1895), and In re Chapman, 166 U.S. 661 (1897), to support its view that a criminal contempt conviction does not bar a subsequent prosecution for a substantive criminal offense ignores the dramatic evolution of criminal contempt over the last century. At the time Debs and Chapman were decided, defendants charged with criminal contempt did not enjoy even the most basic constitutional protections applicable to criminal trials. It is hardly remarkable that the Court was then of the view that defendants were not protected by the Double Jeopardy Clause.

In the years since Debs and Chapman were decided, the law of criminal contempt has undergone a complete transformation. Defendants in non-summary contempt proceedings have been granted protections coextensive with those afforded to defendants in ordinary criminal proceedings. In Bloom v. Illinois, 391 U.S. 194, 201 (1968), the Court set forth the view of non-summary

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[4]On remand in both Columbo and Menna, the New York courts held that the subsequent criminal prosecution was barred by the earlier contempt conviction. See People v. Menna, 38 N.Y.2d 850, 382 N.Y.S.2d 56, 345 N.E.2d 599 (N.Y. 1976); People v. Columbo, 31 N.Y.2d 947, 341 N.Y.S.2d 97, 293 N.E.2d 247 (N.Y. 1972).

criminal contempt proceedings that has served as the foundation for this transformation:

> Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. ... [C]onvictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed the role of criminal contempt and that of many ordinary criminal laws seem identical -- protection of institutions of our government and enforcement of their mandates.

Id. at 201. See, e.g., Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) (right to disinterested prosecutor); Panico v. United States, 375 U.S. 29 (1963) (right to raise insanity defense); Offutt v. United States, 348 U.S. 11 (1954) (right to public trial before unbiased judge); In re Oliver, 33 U.S. 257 (1948) (same); Cooke v. United States, 267 U.S. 517 (1925) (right to counsel, to call witnesses, to be advised of charges and to respond); Ex parte Grossman, 267 U.S. 87 (1925) (eligibility for executive pardon); Gompers v. United States, 233 U.S. 604 (1914) (protection of statute of limitations); Gompers v. Bucks Stove & Range Company, 221 U.S. 418 (1911) (presumption of innocence, proof beyond reasonable doubt, right not to testify). Thus, it is not Grady v. Corbin, 110 S. Ct. 2084 (1990), that has "draw[n] into question," Petition at 17, successive prosecutions for criminal contempt and substantive criminal offenses, but the transformation of the law of criminal contempt.

As the District of Columbia Court of Appeals correctly concluded, 598 A.2d at 732, the reasoning in Bloom and subsequent decisions of this Court recognizing that criminal contempt "is a crime in the ordinary sense" require application of double jeopardy protections to cases involving successive prosecutions for contempt and substantive criminal offenses. The impact of the contempt prosecution on the defendant, Bloom, 391 U.S. at 201, including the imposition of "extremely serious penalties," id. at 207, as well as the danger of government overreaching, id. at 202, are core double jeopardy concerns. See, e.g., United States v. Wilson, 420 U.S. 332, 343 (1975); United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion of Harlan, J.); Green v. United States, 355 U.S. 184, 187-188 (1957).[5]

Petitioner's request that the Court use this case to hold that defendants convicted of criminal contempt should not be protected by the Double Jeopardy Clause's prohibition on successive prosecutions for the same offense is particularly inappropriate on the facts of these cases. Petitioner's argument assumes that the instant contempt prosecutions were brought to vindicate the authority of the court, not to enforce the substantive criminal law. The orders respondents were found to have violated, however, merely compel compliance with the criminal law in general (in the case of Dixon) and specific

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[5]Summary contempt proceedings involve abbreviated procedures and, for that reason, do not raise the same double jeopardy concerns as non-summary contempt proceedings. By definition, a defendant held in summary contempt does not face the burdens of a second trial.

provisions of the criminal law (in the case of Foster). Moreover, at the time of each of these contempt trials, prosecutions for the substantive criminal offense had already been initiated by the United States.

Because of the unusual nature of the court orders in these cases, the contempt prosecutions served the same aims as the substantive criminal law and are therefore contrary to well-established principles of necessity, principles which limit the exercise of the contempt power. As this Court stated in Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 800 (1987)

> [t]hat criminal procedure protections are now required in [criminal contempt] prosecutions should not obscure the fact that these proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings.

(footnote omitted). See Spallone v. United States, 493 U.S. 265, ___, 110 S. Ct. 625, 632 (1990) ("'in selecting contempt sanctions, a court is obliged to use the "least possible power adequate to the end proposed"'") (citations omitted); United States v. Providence Journal Company, 485 U.S. 693, 701 (1988) (contempt power "is grounded first and foremost upon necessity").

Petitioner's argument for review relies on an outmoded view of criminal contempt, a view that criminal contempt should not be

considered "a crime in the ordinary sense." In addition, because the criminal contempt prosecutions in these cases functioned merely as expedited criminal prosecutions, rather than prosecutions grounded on "necessity," they do not provide appropriate vehicles for the Court to address the question posed by petitioner, namely, whether there is a contempt exception to the Double Jeopardy Clause's prohibition of successive prosecutions for the same offense.

B. Grady v. Corbin Has Clarified The Applicable Double Jeopardy Principles

Petitioner contends that, before this Court's decision in Grady v. Corbin, 110 S. Ct. 2084 (1990), "the great majority of state and federal courts agreed that double jeopardy principles did not prohibit successive prosecutions for criminal contempt and substantive criminal offenses based on the same conduct." Petition at 11. Petitioner contrasts this supposed uniformity with the "conflict" that has developed since Grady began to "sow confusion in the law of double jeopardy." Petition at 17.

This description of the legal landscape before and after Grady is misleading in several respects. Grady did not create the conflict; to the contrary, Grady has served to eliminate much of the conflict in the area. Prior to the decision in Grady, there existed substantial and long-standing disagreement among the state and federal courts regarding the application of double jeopardy principles to successive prosecutions for contempt and substantive criminal offenses. Numerous state and federal courts

had held that successive prosecutions for criminal contempt and substantive criminal offenses were barred by principles of double jeopardy. See, e.g., United States v. Haggerty, 528 F. Supp 1286, 1295-1298 (D. Colo. 1981); United States v. United States Gypsum Co., 404 F. Supp. 619 (D.D.C. 1975); State v. Hope, 449 So.2d 633 (La. Ct. App. 1984); State v. Thompson, 294 Or. 528, 659 P.2d 383 (Ore. 1983); People v. Menna, 38 N.Y.2d 850, 382 N.Y.S.2d 56, 345 N.E.2d 599 (N.Y. 1976); People v. Lombardo, 123 Cal. Rptr. 755, 50 Cal.App.3d 849 (Cal. Ct. Ap. 1975); People v. Columbo, 31 N.Y.2d 947, 341 N.Y.S.2d 97, 293 N.E.2d 247 (N.Y. 1972).[6]

In the months since Grady was decided, however, there has been virtual unanimity on this issue. With only one exception, every court to address the issue after Grady, including the highest courts of Hawaii and South Carolina, has held that successive prosecutions for contempt and substantive criminal

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[6]Many of the state and federal cases cited by petitioner predate the sweeping changes in the law of non-summary criminal contempt and are therefore of questionable value. See, e.g., Orban v. United States, 18 F.2d 374 (6th Cir. 1927); Hansen v. United States, 1 F.2d 316 (7th Cir. 1924); Lewinsohn v. United States, 278 F. 421 (7th Cir. 1921), cert. denied, 258 U.S. 630 (1922); Merchants' Stock & Grain Co. v. Board of Trade of Chicago, 201 F. 20 (8th Cir. 1912); Chicago Directory Company v. United States Directory Company, 123 F. 194 (S.D.N.Y. 1903); Ex parte Morris, 227 P. 914 (Cal. 1924); Ex parte Allison, 90 S.W. 870 (Tex. 1906); Fisher v. McDaniel, 64 P. 1056 (Wyo. 1901).

Similarly, many of the cases cited involve summary, rather than non-summary, contempt. See, e.g., United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971); United States v. Ferrugia, 604 F. Supp. 668 (E.D.N.Y. 1985); United States v. Mirra, 220 F. Supp. 361 (S.D.N.Y. 1963); Maples v. State, 565 S.W.2d 202 (Tenn. 1978). For the reasons stated above, summary contempt does not raise the same double jeopardy concerns as non-summary contempt.

offenses based on the same conduct are barred by the Double Jeopardy Clause. Compare State v. Kipi, 811 P.2d 815 (Haw.), cert. denied, 112 S. Ct. 194 (1991); State v. Magazine, 393 S.E.2d 385 (S.C. 1990); see also State v. Mojarro, 816 P.2d 260 (Ariz. Ct. App. 1991); In re D'Attomo, 570 N.E.2d 260 (Ill. App. Ct. 1991); State v. Vanselow, 572 N.E.2d 269 (Ohio Mun. Ct. 1991); State v. White, 591 A.2d 954 (N.J. Sup. Ct. App. Div. 1991), with Ex parte Williams, 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc).[7]

The state courts and lower federal courts have had only a short period of time in which to interpret and apply the analysis in Grady to successive prosecutions for criminal contempt and substantive criminal offenses. Indeed, this Court has recently provided additional clarification as to the scope of Grady. See United States v. Felix, 60 U.S.L.W. 4259 (March 25, 1992). Petitioner is asking the Court to intervene prematurely, before there has been an opportunity for any conflict to either crystalize or dissipate. The Court should not step in to resolve a conflict before there has been an opportunity for the conflict to resolve itself.

Indeed, because of the difference between the orders in these cases and the order at issue in Ex parte Williams, it is not clear that there is a "sharp conflict," Petition at 16,

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[7]People v. Heard, 566 N.E.2d 896 (Ill. App. Ct. 1991), cited by petitioner as a second case in which a state court has "rejected a similar double jeopardy argument after Grady," Petition at 16 n.13, involved summary, as opposed to non-summary contempt.

between the two decisions, as petitioner contends. The order at issue in Williams prohibited the parties from "causing or threatening to cause physical contact or bodily injury to each other." Id. at 305.[8] Because the order prohibits lawful as well as unlawful "contact," it clearly does more than direct compliance with provisions of the substantive criminal law.

This is a crucial distinction and one implicitly acknowledged by the District of Columbia Court of Appeals:

> The Grady Court itself recognized that a single act or transaction may constitute two or more types of "conduct," one of which may be punishable in a contempt proceeding and another in a subsequent criminal proceeding. The Court said that its holding,
>
> > would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (i.e., if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence).
>
> 110 S. Ct. at 2094 (footnote omitted). Thus the Court envisioned Corbin's act of driving and hitting two other cars as encompassing at least three different types of conduct: driving while intoxicated, failing to keep right of the median (for both of which he was convicted in traffic court), and driving too fast in heavy rain (for which he was not convicted in traffic court). In like manner, where a civil protection order prohibits assaults and also requires the respondent to stay away from the petitioner, and an assault is committed against the petitioner,

[8]Petitioner's characterization of the order simply as "an injunction forbidding [the defendant] from causing or threatening to cause bodily injury," Petition at 15, is incomplete.

> the language we have just quoted from Grady suggests that the breach of the stay-away portion of the order might be punished as a contempt without jeopardizing a later criminal prosecution for the assault itself. That hypothetical case, of course, is not before us today ....

598 A.2d at 732-733 (footnote omitted).

Decisions interpreting Grady to bar successive prosecutions for contempt and underlying substantive criminal offenses in no way threaten the administration of justice. As the District of Columbia Court of Appeals expressly noted, "[t]he reader should not conclude that civil protection orders can no longer be enforced by contempt proceedings in the post-Grady era." Id. at 733. As outlined by the Court of Appeals, simple adjustments in the drafting of civil protection orders, for example, would permit their enforcement through citations for criminal contempt without "jeopardizing a later criminal prosecution." Id.

Finally, the Court should reject petitioner's suggestion that review should be granted to reconsider "the reasoning and the result" in Grady. Petition at 17. Grady made explicit what had been implicit in numerous prior decisions of this Court, namely, that the scope of the protection afforded by the Double Jeopardy Clause is greater when successive prosecutions, as opposed to multiple punishments, are at stake.

Where multiple punishments in a single trial are involved, this Court has made clear that the Double Jeopardy Clause serves a limited purpose. It "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366 (1983). The

sole question for the reviewing court is whether the legislature intended to permit multiple punishments. See Jones v. Thomas, 491 U.S. 376 (1989).

In successive prosecution cases, however, "[t]he Double Jeopardy Clause is not a device designed to assure effectuation of legislative intent -- but to the contrary is often the means of frustrating it." Jones, 491 U.S. at 391 (Scalia, J., dissenting). This is because the prohibition on successive prosecutions for the same offense "lies at the heart of the Double Jeopardy Clause." Jeffers v. United States, 432 U.S. 137, 150 (1977). At the most basic level, the Double Jeopardy Clause stands as a barrier to government overreaching, reflecting society's "concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm the government with a potent instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977). A second trial forces the defendant to "run the gauntlet" a second time, Green v. United States, 355 U.S. 184, 190 (1957), subjecting him to a second round of "embarrassment, expense and ordeal," compelling him "to live in a continuing state of anxiety and insecurity." Id. at 190.

A second trial also interferes with a defendant's expectation that the results of the first trial would be final. The Double Jeopardy Clause establishes, in effect, "'a constitutional policy of finality for the defendant's benefit' ... [one that] protects the accused ... from attempts to secure

additional punishment after a prior conviction and sentence." Brown v. Ohio, 432 U.S. 161, 165-166 (1977) (citation omitted). Attempts to seek additional punishment through successive prosecutions amount to usurpation of the judicial and legislative role. See United States v. Halper, 490 U.S. 435, 451 n.10 (1989).

The analytical framework relied upon in Grady had been previously articulated in Brown v. Ohio. Brown recognized that the Double Jeopardy Clause requires more extensive inquiry in cases involving successive trials than those involving a single trial:

> The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some instances where the second prosecution requires the relitigation of factual issues already resolved by the first.

432 U.S. at 166 n.6. See Illinois v. Vitale, 447 U.S. 410 (1980) (focusing on the state's proof); see also United States v. Halper, 490 U.S. 435, 451 n.10 (1989) (distinguishing between the analysis used for multiple punishments and successive prosecution claims); Jeffers v. United States, 434 U.S. 137, 148 (1977) (plurality opinion) (same).

In United States v. Felix, the Court recently clarified the scope of Grady. The Court held that Grady did not overrule long-standing precedent which held that "a substantive crime and a conspiracy to commit that crime, are not the 'same offense' for

double jeopardy purposes." 60 U.S.L.W. at 4263. However, the Court reaffirmed that portion of Grady that recognized that successive prosecutions for offenses that "were not technically lesser included offenses," id. at 4262, were nonetheless barred by the Double Jeopardy Clause when they constituted "a species of lesser included offense." Id. (citing Illinois v. Vitale, 447 U.S. 410, 420 (1977)). Having so recently clarified Grady, the Court should decline petitioner's invitation to reconsider this decision once again.

CONCLUSION

For the reasons set forth above, respondents respectfully request the petition for a writ of certiorari be denied.

Dated: April 6, 1992

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth G. Taylor, hereby certify that a true and accurate copy of the Brief of Respondents in Opposition in United States v. Alvin J. Dixon, et al., and respondents' Motion for Leave to Proceed in Forma Pauperis in that action, were served on all parties required to be served in compliance with Supreme Court Rule 29.3, by depositing the documents, first-class postage prepaid, in a United States mailbox on April 6, 1992, addressed to counsel as follows:

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Served pursuant to Rule 29.4(a)

Dated: April 6, 1992

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(2)

No. 91-1231

Supreme Court, U.S.
FILED
APR 17 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents contend that this case is moot because the court of appeals has already issued its mandate and, in the case of respondent Foster, the trial court has subsequently dismissed the indictment. Br. in Opp. 4-7.

a. The trial court in Dixon's case originally dismissed the indictment, while the trial court in Foster's case rejected Foster's double jeopardy challenge to his indictment. The government appealed the dismissal of the indictment in Dixon's case, and Foster appealed the trial court's refusal to dismiss the indictment in his case. On October 31, 1991, the District of Columbia Court of Appeals held, in the decision we are asking this Court to review, that both indictments should have been dismissed. The time within which the government could file a petition

for a writ of certiorari from that decision thus ran until January 29, 1992.

The court of appeals issued its mandates in both cases on or about November 22, 1991. Although respondents are correct that the government did not move for a stay of the mandate, respondents neglect to mention that, on December 9, 1991, the government moved in the court of appeals to recall the mandate on the ground that the Solicitor General was considering whether to file a petition for a writ of certiorari. The court of appeals took no action on that motion.

No further proceedings occurred in Dixon's case, since the trial court had originally dismissed the indictment and the mandate did not require any further action by the trial court. In Foster's case, however, the government notified the trial court that the government was considering filing a petition for a writ of certiorari. Although the government requested a postponement until a petition for certiorari was filed or a determination was made not to file such a petition, the trial court dismissed Foster's indictment on January 17, 1992. On the same day, the Solicitor General authorized filing the instant petition. On January 28, 1992, the government moved in the trial court for reconsideration of the dismissal of the indictment, informing the court that a petition for a writ of certiorari would be filed by the following day.

On January 29, 1992, the instant petition was filed.[1] On February 6, 1992, the trial court in Foster's case denied our motion for reconsideration. On February 20, 1992, we filed a notice of appeal from the dismissal of the indictment.

b. Respondents' suggestion that there is no live controversy between the parties is mistaken. Respondents

[1] On February 5, 1992, in light of the pendency of the instant petition and our motion for reconsideration in the trial court, we filed a motion in the court of appeals to hold our previous motion to recall the mandate in abeyance. As of the date on which this brief is filed, the court of appeals has not acted on either our motion to recall the mandate or our motion to hold in abeyance.

concede, as they must, that "issuance of the mandate, without more, does not deprive this Court of jurisdiction." Br. in Opp. 7 n.3. Previous decisions of this Court have firmly established, in a variety of circumstances, that the issuance of a court of appeals' mandate has no effect on the power of this Court to review the court of appeals' judgment. See, *e.g.*, *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581-582 n.2 (1983); *Mancusi* v. *Stubbs*, 408 U.S. 204, 206-207 (1972); *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948); *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 467 (1947); *Carr* v. *Zaja*, 283 U.S. 52, 53 (1931).[2] See also *United States* v. *R.L.C.*, No. 90-1577, (Mar. 24, 1992), slip op. 3. The reason for that rule is that a reversal of the judgment of a lower court by this Court serves to vacate the lower court's judgment and to nullify what was done under the mandate embodying the erroneous judgment. *United States* v. *Villamonte-Marquez*, 462 U.S. at 581-582 n.2. Accordingly, the issuance of the mandate by the court of appeals in this case does not deprive this Court of jurisdiction.

Respondents argue, however, that a lower court can in effect cut off the government's ability to obtain review by dismissing an indictment before the time for filing a petition for a writ of certiorari has run. According to respondents, further review after an indictment is dismissed "would be purely advisory in nature," Br. in Opp. 5, because "the dismissals of the indictments with prejudice * * * eliminates any live case or controversy," Br.

[2] In *Dakota County* v. *Glidden*, 113 U.S. 222, 224 (1885), this Court explained that the mere fact that the judgment of a lower court was complied with does not affect the ability of the losing party to obtain further review of that judgment. The court noted in *Dakota County* that a creditor may obtain execution of a judgment against a debtor and a claimant to land may execute upon a judgment of ejectment of defendant without affecting the debtor's or the defendant's ability to obtain review of the judgment involved. *Id.* at 224. Under precisely the same principle, a criminal defendant may obtain dismissal of his indictment without affecting the ability of the government to obtain further review of that dismissal.

in Opp. 7 n.3. In other words, respondents' contention appears to be that further review in this case would be "purely advisory" because this Court, should it reverse the decision below, could grant no relief to the government, *i.e.*, the indictments could not be reinstated.

Respondents do not reveal the legal authority upon which they base the novel proposition that an indictment, once dismissed, may not be reinstated. In this case, for example, Dixon's indictment was dismissed prior to trial. Yet, had the District of Columbia Court of Appeals held that the dismissal was erroneous, respondents concede that the indictment could have been reinstated. Br. in Opp. 4 n.1. The same principle would authorize reinstatement of Foster's indictment if this Court reverses the judgment of the court of appeals. Just as a trial court order dismissing an indictment is not final until the time for filing a notice of appeal has passed, a decision of the court of appeals ordering dismissal of an indictment—or affirming a prior dismissal of an indictment—is not final until the time for filing a petition for a writ of certiorari has passed.[3]

In short, nothing has occurred in this case to render it moot.[4] Certainly the fact that the indictments in this case were dismissed "with prejudice" does not affect the

[3] In respondents' own terms, "[t]he statute that authorizes the government to [petition for a writ of certiorari] from [an appellate decision requiring dismissal of an indictment] means, in effect, that such a [decision] is not final until the [decision] is affirmed [on certiorari] and the mandate [of this Court] has issued" or until the petition for a writ of certiorari has been denied. Br. in Opp. 4 n.1.

[4] Respondents wrench a statement in our brief in opposition in *Republic Nat'l Bank* v. *United States*, cert. granted, No. 91-767 (Feb. 24, 1992), entirely out of context and assert that it supports their position here. Our brief argued that the petitioner in the circumstances of that case could have avoided being bound by unfavorable circuit precedent, which was in conflict with precedent in other circuits, simply by seeking a stay of the district court decision pending appeal. The petitioner in *Republic Nat'l Bank* alleged a conflict in the circuits concerning whether a court of appeals lacks jurisdiction over an appeal from an *in rem* forfeiture proceeding

power of this Court to review the court of appeals' decision. The phrase "with prejudice" simply indicates that the dismissal will preclude reprosecution of the defendants on the same charges. That is, the term "with prejudice" means that the dismissal will be given res judicata effect in any subsequent case. But the term does not mean that the government loses all rights to further review of the dismissal in the same case. If it did, the government would never be able even to take any appeal to a court of appeals from a "with prejudice" dismissal by a district court.[5] A trial court's use of the term "with prejudice" in an order dismissing an indictment—or in any other order it might enter—has never been understood to preclude review of that order on appeal or writ of certiorari. Cf., *e.g.*, *United States* v. *Taylor*, 487 U.S. 326, 332 (1988) (reversing court of appeals' affirmance of district court dismissal of an indictment with prejudice); see also *United States* v. *Loud Hawk*, 474 U.S. 302, 310 (1986).

Nor does anything in this Court's decisions in *Preiser* v. *Newkirk*, 422 U.S. 395 (1975), or *Mills* v. *Green*, 159 U.S. 651 (1895)—the only two cases cited by respondents—support respondents' argument. In *Newkirk*, the petitioner complained that his transfer from a medium-security prison to a maximum security prison was unconsti-

after the *res* is removed from the district. We argued that the conflict may have little practical significance, since a party in the petitioner's situation could in any event avoid removal of the *res*—and thus avoid the unfavorable appellate precedent—by obtaining a stay of a district court forfeiture order. In that context, we stated that "petitioner's failure to take the minimal steps necessary to seek a stay pending appeal undermines its claim to discretionary review by this Court." 91-767 Br. in Opp. at 11. We did not make any claim concerning mootness in that case and, indeed, no such claim could have been made.

[5] Indeed, in this very case, Dixon's indictment was originally dismissed "with prejudice." Pet. App. 57a. The trial court's use of that term did not, however, render the government's appeal of Dixon's indictment moot or otherwise deprive the court of appeals, or this Court, of jurisdiction.

tutional. While the case was being litigated in the lower courts, the petitioner was retransferred back to the medium-security institution. This Court held that, because the petitioner had gotten the relief he sought and there was no longer any "reasonable expectation that the wrong will be repeated," the case was moot. 422 U.S. at 402. Similarly, in *Mills*, this Court held that, because the Court could grant no relief to a plaintiff complaining that an election held during the pendency of the action was unconstitutional, the case was moot. 159 U.S. at 657-658. Neither case involved facts remotely similar to those in this case, and neither case provides any support for respondents' contention that an indictment, once dismissed with prejudice, cannot be reinstated. In *Preiser*, the petitioner got the relief he wanted, while in this case, the government has been denied the relief it sought in the lower courts. And in *Mills*, the Court could no longer grant effective relief to the petitioner, while in this case the government will be able to reinstate proceedings against respondents if this Court reverses the judgment of the court of appeals.

2. Respondents concede that "[p]rior to the decision in *Grady* [v. *Corbin*, 495 U.S. 508 (1990)], there existed substantial and long-standing disagreement among the state and federal courts regarding the application of double jeopardy principles to successive prosecutions for contempt and substantive criminal offenses." Br. in Opp. 14. The substance of that statement is generally correct, although we disagree with respondents' characterization; in our view, the situation prior to *Grady* was one of overwhelming consensus that the Double Jeopardy Clause did not bar such successive prosecutions. Pet. 11-15.[6] What-

[6] Of the seven cases cited by respondents (Br. in Opp. 15) that had held prior to *Grady* that successive prosecutions were barred, only three are from federal courts of appeals or the highest court of a State. One of those three, *State* v. *Thompson*, 659 P.2d 383 (Or. 1983), was based on state law. See Pet. 13-14 n.10. The other two are the holdings of the New York Court of Appeals on remand from this Court's decisions in *Colombo* v. *New York*, 405 U.S. 9 (1972) (per curiam), and *Menna* v. *New York*, 423 U.S. 61 (1975). See Pet. 10 n.6. Moreover, respondents assert (Br. in Opp. 15 n.6) that four of the cases we cited in the petition involved summary contempt charges, which respondents believe should be treated differently. Even if such cases require a different analysis, a conclusion that is by no means obvious, the remaining pre-*Grady* decisions cited in our petition plainly support our contention that contempt is not the "same offense" as a substantive crime based on the same conduct.

ever the degree of disagreement in the lower federal and state courts prior to *Grady*, however, this Court's decision in *Grady* did not expressly address that disagreement or otherwise consider the application of double jeopardy principles to contempt prosecutions. Rather than assuming, therefore, as do respondents, that *Grady* and the other decisions cited by respondents (Br. in Opp. 8-11) swept away the substantial body of precedent from this Court, the lower federal courts, and the state courts permitting successive prosecutions in cases like this one, we submit that further review to consider the application of the Double Jeopardy Clause to successive prosecutions for contempt and for substantive criminal violations is warranted.

Respondents also contend that, since *Grady*, "there has been virtual unanimity" that the Double Jeopardy Clause precludes successive prosecutions for criminal contempt and a substantive criminal charge. Br. in Opp. 15. That "virtual unanimity" appears to consist of two decisions of state "court[s] of last resort," see Sup. Ct. R. 10.1(b), that agreed with the decision of the District of Columbia Court of Appeals in this case, see *State* v. *Kipi*, 811 P.2d 815 (Haw.), cert. denied, 112 S. Ct. 194 (1991); *State* v. *Magazine*, 393 S.E.2d 385 (S.C. 1990), and one decision of such a court that disagreed, see *Ex parte Williams*, 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc). Accordingly, the conflict among the lower courts on the issue presented in this case was not resolved by *Grady*, and in fact has deepened since *Grady* was decided. In light of the pre-*Grady* authority and the post-*Grady* decision in *Williams*, further review to resolve the conflict is warranted.

Respondents additionally contend that the conflict between *Williams* and the present case is "not clear" because the order at issue in *Williams* "prohibited the parties from 'causing or threatening to cause physical contact or bodily injury to each other,'" while the orders at issue in the present cases prohibited only unlawful conduct. Br. in Opp. 16, 17. As a matter of fact, that conclusion is doubtful, at least as to Foster. Foster was convicted of contempt for violating an order that he not "molest, assault, or in any manner threaten or physically abuse his" wife. Pet. App. 4a. The D.C. Criminal Code does not make it a crime to "molest" another person, and the term "molest" does not appear to refer only to conduct that could be criminally prosecuted under other criminal prohibitions. See *Webster's Third New International Dictionary* 1455 (1986) (defining "molest" as "annoy, persecute, disturb, torment"). Nor, although the D.C. Code does make it a crime to threaten to do bodily harm, see D.C. Code Ann. § 22-507 (1981), and to threaten to kidnap or injure a person or damage his property, see D.C. Code Ann. § 22-2307 (1981), is it clear that to prohibit Foster from "in any manner threaten[ing]" his wife was merely to prohibit him from engaging in conduct otherwise punishable by the criminal law.

In any event, the defendant in *Williams* was prosecuted not for merely "caus[ing] physical contact," Br. in Opp. 17, but for shooting and injuring two neighbors. Accordingly, even if the order in *Williams* differed from the orders in the present cases, as respondents suggest, the fact remains that that difference was irrelevant to the court's decision in *Williams*.[7] In short, had the present cases arisen in Texas, the indictments of Dixon and Foster would have been upheld. There is thus a clear conflict on the issue presented in this case between the District of Columbia Court of Appeals and the Texas Court of Criminal Appeals.

[7] We doubt whether the difference suggested by respondents would be of any significance in any case. It would be odd to conclude that successive prosecutions would have been permissible had the orders in the present cases been worded more broadly to encompass plainly non-criminal conduct, but that those same prosecutions were impermissible under the narrower orders that were actually issued.

3. Respondents repeatedly misstate the question we have presented in this case. According to respondents, we have asserted that "there is an exception to the protection afforded by the Double Jeopardy Clause in successive prosecution cases in cases involving prosecutions for non-summary contempt," Br. in Opp. 7, "that defendants convicted of criminal contempt should not be protected by the Double Jeopardy Clause's prohibition on successive prosecutions for the same offense," Br. in Opp. 12, and that "there is a contempt exception to the Double Jeopardy Clause's prohibition of successive prosecutions for the same offense," Br. in Opp. 14. Those characterizations of our position are erroneous.

The question presented in this case is not whether the Double Jeopardy Clause applies to criminal contempt cases, just as the question presented in *United States* v. *Felix*, No. 90-1599 (Mar. 25, 1992), was not whether the Double Jeopardy Clause applies to conspiracy cases. Rather, the question presented here is whether criminal contempt is the "same offense" as the substantive criminal offenses charged in this case, just as one of the questions in *Felix* was whether criminal conspiracy was the "same offense" as the substantive offenses charged there. The Double Jeopardy Clause applies to all criminal prosecutions; thus, it would plainly bar successive prosecutions on the same criminal contempt charge. The question presented here is whether it bars successive prosecutions for contempt and for a substantive offense based on the same conduct.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

APRIL 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45411

Supreme Court, U.S.
FILED
JUN 19 1992
OFFICE OF THE CLERK

(4)

No 91-1231

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

JOINT APPENDIX

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Public Defender Service
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(202) 628-1200
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Counsel for Petitioner

In the Supreme Court of the United States

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JOINT APPENDIX

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

No. F-8415-88

UNITED STATES

v.

MICHAEL FOSTER

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/21/88	Defendant informed of rights pursuant to Superior Court rule 5(b) including the right to counsel. $20,000 S bond. Prel Hearing set 7-28-88.
7/28/88	• • • Count B held for Grand Jury action. All parties are present. $20,000 surety bond. O/C filed within.
11/22/88	Motion to dismiss complaint and to enjoin permanently all grand jury proceedings and points and authorities in support thereof filed 11-1-88 and forwarded to J. Scott.
11/28/88	Govt's opposition to motion to dismiss filed 11-22-88.
12/12/88	Deft's reply to govt's opposition to deft's motion to dismiss and enjoin grand jury filed 12-8-88.
1/9/89	Indictment filed, counts C-G.

DATE	PROCEEDINGS
4/7/89	* * * Court denied deft motion to dismiss indictment. Court granted the motion of the Women's Legal Deft fund for leave to appear as an amicus curiae. * * *
4/10/89	Notice of Appeal filed this date felony.
11/4/91	* * * The status is cont to permit the AUSA to review the court of Appeals ruling in this case.
11/22/91	Certified copy from DCCA reversing Appeal.
12/3/91	Pursuant to the Mandate recv'd from the DCCA, the judgment on appeal is reversed and this case is remanded for further proceedings.
12/5/91	* * * Case cont for additional Status for the court to review the various filed documents.
12/10/91	* * * The case is cont for additional status per the govt's request.
1/17/92	* * * Hearing held. Deft motion to dismiss case is granted. Case dismissed w/prejudice by the court.
1/28/92	Govt's motion to reconsider dismissal of indictment.
2/3/92	Deft's opposition to govt's motion to reconsider dismissal of indictment.
2/6/92	Order entered denying govt's motion to reconsider dismissal of indictment.
2/14/91	Notice of Appeal filed in felony.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 89-449

MICHAEL FOSTER

v.

UNITED STATES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/22/89	[APPELLANT'S] DOCKETING STATEMENT
11/1/89	ARGUED
11/28/89	ORD: SUA SPONTE CONSOLIDATING THIS APPEAL WITH NO. 88-1375 FOR THE PURPOSE OF EN BANC ARGUMENT * * *. THIS APPEAL TO BE REHEARD EN BANC ON 1/10/90 AT 10:00 A.M.
12/28/89	MISC. PROCEDURAL MOTION OF WOMENS LEGAL DEFENSE FUND, MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT
1/8/90	ORDER GRT MO OF WOMEN'S LEGAL DEFENSE FUND TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS

DATE	PROCEEDINGS
1/10/90	ARGUED • • •
11/22/91	MANDATE ISSUED
12/9/91	MISC. SUBSTANTIVE MOTION OF [APPELLEE] TO RECALL MANDATE
12/13/91	[APPELLANT'S] OPPOSITION TO [APPELLEE'S] MOTION TO RECALL MANDATES
2/5/92	MISC. SUBSTANTIVE MOTION OF [APPELLEE] TO HOLD ABEYANCE MOTION TO RECALL MANDATE
6/11/90	JUDGMENT: AFFIRMED • • •
10/10/90	ORDER filed denying petition for en banc rehearing • • •
10/18/90	MANDATE ISSUED • • •

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

No. F-442-88

UNITED STATES

v.

ALVIN J. DIXON

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/21/88	INDICTMENT FILED • • •
8/12/88	MTNS Hearing held pursuant to Deft's MTN to dismiss the indictment on the grounds of double jeopardy. Court will take mtn under advisement. • • •
9/29/88	Opinion and order filed. Defendant's motion to dismiss indictment granted.
10/25/88	Notice of Appeal filed this date in felony.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-1375

UNITED STATES, APPELLANT

v.

ALVIN DIXON, APPELLEE

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/2/88	[APPELLANT'S] DOCKETING STATEMENT
5/9/89	ARGUED
11/28/89	ORD: SUA SPONTE CONSOLIDATING THIS APPEAL WITH NO. 89-449 FOR THE PURPOSE OF EN BANC ARGUMENT • • •. THIS APPEAL TO BE REHEARD EN BANC ON 1/10/90 AT 10:00 A.M.
1/8/90	[GRANT] MO[TION] OF WOMEN'S LEGAL DEFENSE FUND TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS
1/10/90	ARGUED • • •
10/31/91	AFFIRMED. JUDGMENT AF JUDGMENT AS TO DIXON (RV JUDGMENT AS TO FOSTER IN 89-449)

DATE	PROCEEDINGS
11/22/91	MANDATE ISSUED
12/9/91	MISC. SUBSTANTIVE MOTION OF [APPELLANT] TO RECALL MANDATE
12/13/91	[APPELLEE'S] OPPOSITION TO [APPELLANT'S] MOTION TO RECALL MANDATE
1/21/92	RECEIVED SUPPLEMENT TO OPPOSITION TO MOTION TO RECALL MANDATES
2/3/92	NOT. OF FIL. PET FOR CERT
2/5/92	MISC. SUBSTANTIVE MOTION OF [APPELLANT] TO HOLD ABEYANCE MOTION TO RECALL MANDATE

PDID#197763
CASE#87068896

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

United States of America
v.

Case No. F2670-87

Alvin James Dixon Sr. (Defendant's name) 140 57th Place, SE (Defendant's address) (202) 575-8460 (Defendant's phone no.)

YOU ARE HEREBY RELEASED ON THE CONDITIONS INDICATED BELOW:
THESE CONDITIONS WILL BE IN EFFECT UNTIL YOUR CASE IS DISPOSED OF OR UNTIL THEY ARE CHANGED OR AMENDED BY A JUDGE

☐	PERSONAL PROMISE	PERSONAL RECOGNIZANCE. Your personal recognizance, provided that you promise to appear at all scheduled hearings, trials, or otherwise as required by the Court.
☐	$ _____	UNSECURED APPEARANCE BOND. Your personal unsecured appearance bond, to be forfeited should you fail to appear as required by the Court.
☐	SUPERVISORY CUSTODY	You hereby agree to be placed in the custody of _____ who agrees (a) to supervise you in accordance with the conditions below, (b) to use every effort to assure your appearance at all scheduled hearings, trials, or otherwise, and (c) to notify the D.C. Pretrial Services Agency immediately in the event you violate any condition of release or disappear. Agency telephone — 727-2800. ▶ _____ (Custodian's name) _____ (Custodian's address) _____ (Custodian's phone no.) ▶ _____ SIGNATURE OF CUSTODIAN
☐	YOU ARE TO STAY	☐ away from the complaining witness. ☐ within the D.C. area.
☐	YOU ARE TO LIVE	☐ at _____ (address) _____ (phone no.) ☐ with _____ (name and relationship to defendant) _____ (phone no.) ☐ at _____ (address) _____ (phone no.) being in at night from ____ P.M. to ____ A.M.
☐	YOU ARE TO	☐ seek to obtain employment and report your progress to the D.C. Pretrial Services Agency every _____ days at 727-2800. ☐ maintain your present employment at _____ (employer's name and address) or notify the D.C. Pretrial Services Agency at 727-2800 of any change in employment.
☐	YOU ARE TO STUDY	☐ by enrolling in school at _____ (name and address) ☐ by maintaining your student status at _____ (name and address)
☐	NARCOTICS	☐ Report to the D.C. Pretrial Services Agency, Room C-220, for narcotics evaluation and possible placement. ☐ Report to the D.C. Pretrial Services Agency, Room C-220, for program placement, and refrain from illegal drug use. ☐ Maintain Program participation at: ☐ PSA ☐ ADASA ☐ Other _____ and refrain from illegal drug use.
☐	YOU ARE TO REPORT TO	☐ D.C. Pretrial Services Agency ☐ Weekly ☐ Other _____ ☐ By Phone ☐ In Person ☐ Probation Officer ☐ Weekly ☐ Other _____ ☐ By Phone ☐ In Person ☐ Parole Officer ☐ Weekly ☐ Other _____ ☐ By Phone ☐ In Person
☒	REVIEW	You are to report to the D.C. Pretrial Services Agency at room 1214 immediately upon release for a review of conditions.
☒	YOU ARE TO	Refrain from committing any criminal offense, the penalties for which are explained on the reverse side of this Order.
☒	OTHER	Leaving area
	MONEY BOND IN $ 1500 cash	CASH BOND. Upon execution of appearance bond, to be forfeited should you fail to appear as required by the Court, secured by a deposit, such deposit to be returned when the Court determines you have performed the conditions of your release. You will deposit in the registry of the Court _____%. ☒ SURETY BOND. Upon execution of appearance bond with approved surety.
	NEXT DUE BACK	on 3-17-87 in Courtroom 16 at 9:30 AM. If you have any questions about the date, time, or location CALL THE D.C. PRETRIAL SERVICES AGENCY AT 727-2800.
	YOUR ATTORNEY	_____ (address) _____ (phone no.)
	DEFENDANT'S SIGNATURE	▶ _____ I understand the penalties which may be imposed on me for willful failure to appear or for violation of any condition of release and agree to comply with the conditions of my release and to appear as required.

WITNESSED BY PDS (title or agency) PSA

IMPORTANT: YOU ARE TO NOTIFY IMMEDIATELY THE D.C. PRETRIAL SERVICES AGENCY, 500 INDIANA AVE., N.W., FIRST FLOOR, TELEPHONE NUMBER 727-2800, OF ANY CHANGE OF ADDRESS, EMPLOYMENT, OR CHANGE IN STATUS OF ANY RELEASE CONDITIONS. ANY REARREST FOR ANY OFFENSE BASED ON PROBABLE CAUSE MAY BE GROUNDS FOR REVOCATION OF THIS ORDER.

SO ORDERED

Date 03-09-87

▶ _____ Signature of Judge

WHITE—TO COURT PAPERS
GREEN—TO D.C. PRETRIAL SERVICES AGENCY
BLUE—TO DEFENDANT
YELLOW—TO DEFENSE ATTORNEY
GOLD—TO CUSTODIAN
PINK—TO U.S. ATTORNEY

FORM CD-CR(Rev. 6)

BEST AVAILABLE COPY

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Holding a Criminal Term
Grand Jury Sworn in on January 4, 1988

Criminal No: F-442-88

THE UNITED STATES OF AMERICA

v.

ALVIN J. DIXON

Violation: 33 D.C. Code 541(a)(1)
(Unlawful Possession with Intent to Distribute a Controlled Substance)

The Grand Jury charges:

On or about January 15, 1988, within the District of Columbia, Alvin J. Dixon did unlawfully, knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II controlled substance. (Unlawful Possession with Intent to Distribute a Controlled Substance, in violation of 33 D.C. Code, Section 541(a)(1))

/s/ Joseph E. diGenova
Attorney of the United States in and for the District of Columbia

A TRUE BILL:

/s/ Rufus E. Lassiter
Foreperson.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – FELONY BRANCH

Criminal Case No: F-2670-87

UNITED STATES OF AMERICA

v.

ALVIN J. DIXON

JUDGE WALTON
Trial: June 13, 1988

MOTION TO MODIFY BOND

The United States of America, by and through its Attorney, the United States Attorney for the District of Columbia, respectfully moves the Court to modify bond in the instant case.

1. On March 8, 1987 the defendant, Mr. Alvin J. Dixon, was arrested and charged with murder. Mr. Dixon was subsequently indicted and charged with first degree murder. Mr. Dixon was arraigned on that case, the instant case, and a trial date was set. Mr. Dixon was released on a fifteen hundred ($1,500.00) surety bond on March 9, 1987.

2. On January 15, 1988 Mr. Dixon was arrested and later charged by the Grand Jury with possession with intent to distribute cocaine. When Mr. Dixon was presented on the January 15 charge (F-422-88) the Pretrial Services Agency (PSA) indicated drug use. Indeed, as part of his conditions of release in F-422-88, Mr. Dixon was to report

to PSA for drug testing; as of February 18, 1988 he has failed to report.

3. We request that Mr. Dixon be summoned to court to show cause why his conditions of pretrial release should not be modified, in the instance case. Although Mr. Dixon appeared for a status hearing in F-422-88 on February 22, 1988 we nonetheless submit that his obvious drug abuse and commission of another offense, as found by the Grand Jury, mandates judicial review.

WHEREFORE, the United States requests that its motion be granted.

Respectfully submitted

/s/ Joseph E. diGenóva
JOSEPH E. diGENOVA
United States Attorney

/s/ Ronald Dixon
RONALD DIXON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed with postage prepaid to counsel for defendant, Michelle Roberts, Esquire, Public Defender Service, 451 Indiana Avenue, N.W., Washington, D.C. 20001, on this 23rd day of February 1988.

/s/ Ronald Dixon
RONALD DIXON
Assistant United States Attorney

cc: Judge Von Kann

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

F-2670-87

UNITED STATES OF AMERICA

v.

ALVIN J. DIXON, SR.

ORDER TO SHOW CAUSE

On March 8, 1987, defendant was arrested and charged with murder in the second degree while armed, and released into the community on a $1,500 surety bond on March 10, 1987.[1] Among the conditions of defendant's pretrial release imposed by the Court were the requirements that he "[r]efrain from committing any criminal offense . . ." Nevertheless, this Court has been informed that defendant was rearrested and indicted for a violation of the Uniform Controlled Substance Act (possession with intent to distribute cocaine) in Criminal Case No. F-422-88.

This infraction constitutes a violation of the conditions of defendant's probation and could, therefore, result in defendant being held in contempt of court or having the conditions of his pretrial release modified.

---

[1] An indictment was filed against defendant on December 2, 1987. In the three count indictment, defendant is charged with kidnapping while armed, first degree murder while armed and carrying a pistol without a license.

Wherefore, it [is] on this 29th day of March, 1988, hereby ORDERED that defendant show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified.

Defendant is placed on notice that a Show Cause Hearing shall be held before the Honorable Reggie B. Walton at 9:00 a.m. on April 8, 1988, in Courtroom 14 of the District of Columbia Courthouse. At such hearing defendant is entitled to be represented by counsel and may produce any witnesses or evidence on his behalf.

The government is also ordered to have the appropriate witnesses present at the hearing and prepared to testify concerning the alleged violation of defendant's pretrial release conditions.

/s/ Reggie B. Walton
Judge REGGIE B. WALTON

Copies mailed to:

Alvin J. Dixon, Sr.
140 57th Place, S.E.
Washington, D.C. 20019

Michele A. Roberts, Esquire
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001

Ronald Dixon, AUSA
U.S. Attorney's Office
Felony Trial Service

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Criminal Action No. F-2670-87

UNITED STATES OF AMERICA

v.

ALVIN DIXON, JR.

Washington, D.C.
Wednesday, April 20, 1988

---

[54] * * * * *

THE COURT: Well, the Court has been put on notice of the existence of alleged violation, and the Court was put on notice pursuant to a motion filed by the Government, and the Court was fully aware of the nature of the alleged violation, having issued an order to show cause based upon [55] the violation. I think it merely is a technicality that the Government ask the Court to take judicial notice of this.

I think the Government's burden is to show that there was in fact a crime committed by the defendant while he was on pretrial release. And once the Government shows that then I have to decide whether or not the sanctions should be imposed because the defendant has already been put on notice that the Court is fully aware of the fact that one of the conditions of his release was the commission of no further offenses.

So while I may tend to agree that it is inappropriate for the Government, after its hand has been—after the hand

of the defense has been tipped by closing argument to permit reopening, I don't think that reopening is necessary, considering the circumstances present here.

I would conclude that based upon testimony presented that the Government has established, beyond a reasonable doubt, that the defendant was in possession of drugs and that those drugs were possessed with the intent to distribute them. But, in any event, he was in possession. So even the mere possession, or the possession with intent to distribute, would be a violation of the conditions of his release. And accordingly, I would find the defendant in contempt of Court.

* * * * *

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Case No. F-2670-87
PDID No. 197763

UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA

vs.

ALVIN DIXON, JR.

JUDGMENT AND COMMITMENT/PROBATION ORDER

The above-named defendant having entered a plea of Not Guilty to the Charge(s) of Contempt of Court-rearrest and having been found guilty by Court, it is hereby ORDERED that the defendant has been convicted of and is guilty of the offense(s) charged, and is hereby SENTENCED to 180 days.

MANDATORY MINIMUM term does not apply.

ORDERED that the defendant be committed to the custody of the Attorney General for imprisonment for the period imposed above.

ORDERED that the Clerk deliver a true copy of this order to appropriate authorized official(s) and that the copy shall served as the commitment/order for the defendant.

4-20-88	/s/ Reggie B. Walton
Date	Judge

Certification by Clerk pursuant to Criminal Rule 32(d).

4-20-88	/s/ Cheryl Dixon
Date	Deputy Clerk

FAMILY DIVISION
INTRAFAMILY AND NEGLECT BRANCH

CIVIL PROTECTION ORDER
(PRO-SE)

IF No. 630-87
SF No. 735804-OA

ANA V. FOSTER, PETITIONER

VS.

MICHAEL FOSTER, RESPONDENT

Upon consideration of the petition filed in this case, and after a hearing, the Court has found that there is good cause to believe that the Respondent has committed or threatened an intrafamily offense within the meaning of Section 16-1001, D.C. Code, et seq. (1981). Therefore:

IT IS HEREBY ORDERED that for a period of 12 months from the date of this order:

The respondent shall not molest, assault, or in any manner threaten or physically abuse the petitioner.

By Consent /s/ Michael Foster

FAILURE TO COMPLY WITH THIS ORDER MAY RESULT IN FINE OR IMPRISONMENT

Date: 8-12-87 /s/ Robert I. Ingram
Judge

On the date shown below a copy of this order was served personally on all parties who have been ordered to comply with any provision of this order.

Date: 8-12-87 /s/ [sig. illegible]
Deputy Clerk

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION
INTRAFAMILY AND NEGLECT BRANCH

IF No. 630-87
SF No. 735804-OA

ANA V. FOSTER, PETITIONER

VS.

MICHAEL FOSTER, RESPONDENT

MOTION TO ADJUDICATE CONTEMPT

By order of this Court dated _____, 198__, the Respondent was found to have committed or threatened an intrafamily offense within the meaning of D.C. Code Section 16-1001, et. seq. (1981) against the Petitioner. The order directed the Respondent to observe certain conditions which he/she has failed to do, in that: On or about 9/17/87 at 2:30 P.M. on California St. Respondent threatened Petitioner "I'm going to beat you ass". On or about 9/18/87 at 8:50 pm on Wisconsin Ave. Respondent grabbed Petitioner's right shoulder and forced her into a taxi cab. At 10:30 am on 9/18/87 at 4826 8th St. he slapped petitioner on the side of her face and at 12:45 that same day he threatened to knock her head against a wall.

WHEREFORE, the Petitioner asks the Court that a hearing be set on these charges and that a Notice of Hearing and order Directing Appearance be issued requiring the Respondent to appear in Court to answer these charges and to give any testimony required by the Court. Also, that

following the hearing, the Court find the Respondent in contempt of the prior Court order and make all further rulings as the Court finds appropriate.

Date: 9-22-87

/s/ Lesley E. Oloff, Esq.
Deputy Clerk/Corporation Counsel

VERIFICATION

District of Columbia, ss:

Ana V. Foster, being first duly sworn, states that he/she is the Petitioner, that he/she has read and understands the contents of this motion, and that it is true to his/her knowledge or belief.

/s/ Ana V.C. Foster
Petitioner

Subscribed and sworn to before me this 22nd day of September, 1987.

/s/ ME. Foxworth
Notary Public/Corporation Counsel/Deputy Clerk

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION
INTRAFAMILY AND NEGLECT BRANCH

IF No. 630-87
SF No. 735 004-CA

ANA Virginia FOSTER, PETITIONER

vs.

MICHAEL FOSTER, RESPONDENT

MOTION TO ADJUDICATE CONTEMPT

By order of this Court dated August 12, 1987, the Respondent was found to have committed or threatened an intrafamily offense within the meaning of D.C. Code Section 16-1001, et. seq. (1981) against the Petitioner. The order directed the Respondent to observe certain conditions which he/she has failed to do, in that: The Respondent has repeatedly violated a Civil Protection Order, ordering him to not molest, assault, or in any manner threaten or physically abuse Petitioner. In support of this motion, the Petitioner asserts the following: (See attached)

WHEREFORE, the Petitioner asks the Court that a hearing be set on these charges and that a Notice of Hearing and Order Directing Appearance be issued requiring the Respondent to appear in Court to answer these charges and to give any testimony required by the Court. Also, that following the hearing, the Court find the Respondent in con-

tempt of the prior Court order and make all further rulings as the Court finds appropriate.

Date: 11-19-87 /s/ ME. Foxworth
Deputy Clerk/Corporation Counsel

VERIFICATION

District of Columbia, ss:

Ana V. Foster, being first duly sworn, states that he/she is the Petitioner, that he/she has read and understands the contents of this motion, and that it is true to his/her knowledge or belief.

/s/ Ana V.C. Foster
Petitioner

Subscribed and sworn to before me this 19th day of November, 1987.

/s/ ME. Foxworth
Notary Public/Corporation Counsel/Deputy Clerk

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION
INTRA FAMILY AND NEGLECT BRANCH

IF No. 630-87
ANA VIRGINIA FOSTER, PETITIONER

v.

MICHAEL FOSTER, RESPONDENT

CONTINUATION OF MOTION TO ADJUDICATE CONTEMPT

1. On or about 9/17/87 at 2:30 p.m. on California St., N.W., Respondent threatened Petitioner by saying, "I'm going to beat your ass."

2. On 9/18/87 at 8:30 a.m. on Wisconsin Ave., N.W., Respondent grabbed Petitioner's right shoulder and forced her into a taxi cab. At 10:30 a.m. that same day, at 4826 8th St., N.W., he slapped Petitioner on the side of her face. At 12:45 p.m. that same day, he threatened to knock her head against a wall.

3. On 11/4/87 at 6:15 p.m., Respondent called Petitioner's home, angry that Petitioner and her mother had gone shopping. Respondent said, "Stop your motherfucking games." That same evening, at 8:00 p.m., Respondent came to Petitioner's apartment and verbally harassed and threatened Petitioner by saying, "Tomorrow, when you leave the house, be careful."

4. On 11/5/87 at 2:00 p.m., at 16th and Columbia, N.W., Respondent then followed Petitioner to her work place. On the same day, at 10:30 p.m., Respondent called Petitioner at her work place, shouted at her on the phone

and threatened to beat up people as they left Petitioner's work place, and threatened to blame Petitioner for the consequences.

5. On 11/6/87 at 12:00 a.m., Respondent followed Petitioner and her mother from Petitioner's work place to the bus stop at Kalorama and Columbia, N.W., The police suggested to petitioner that she file charges, since she has a Civil Protection Order. Immediately thereafter at 12:15 a.m. at Kalorama Park. Respondent grabbed Petitioner and threw her against a parked car. Her back and her head hit the car. She lost consciousness. Respondent then fled the scene. Petitioner sustained contusions on her forehead, a cut on her upper lip, and a loosened upper tooth. Her mother and two passersby witnessed the incident. The passersby called the police, who called an ambulance which took Petitioner to George Washington University Hospital emergency room.

6. On 11/9/87, Respondent called Petitioner at her work place and said, "Keep alive as long as you can: you will see my face again."

7. On 11/10/87, at 7:55 p.m., Respondent pounded on the windows of Petitioner's apartment for 5 minutes, saying, "I'm back." Petitioner share[s] an apartment with her mother who also has a C.P.O., against the Respondent. That order requires that Respondent stay completely away [from] the residence.

8. On 11/11/87, in the evening. Respondent called Petitioner at home and said, "The Hilton Hotel is not going to save you."

9. On 11/12/87 at 12:00 p.m., Respondent called Petitioner at home and threatened her with, "Virginia, I will wait for you outside and I'm going to blow out your brains."

10. Respondent has continually harassed and threatened Petitioner over the phone since she has returned to live with her mother.

Each of the above listed incidents are violations of the C.P.O. issued by this court.

Respectfully Submitted

Leslye E. Orloff, #375962
Clinical Legal Latina/Ayuda
1736 Columbia, Rd. N.W.
Washington, D.C. 20009
(202) 387-0434

/s/ ANA V. C. FOSTER
Ana Virginia Foster

DISTRICT OF COLUMBIA, ss:

I, Ana Virginia Foster, first being duly sworn, do hereby state that I have been read this motion in Spanish and that I understand its content and that the above information is true to the best of my knowledge.

/s/ ANA V. C. FOSTER
Ana Virginia Foster

Subscribed and sworn before me this ____ day of _____, 1987.

_____
Notary Public, DC

My Commission expires: _____

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION
INTRAFAMILY AND NEGLECT BRANCH

IF No. 630-87
SF No. 735804-OA

ANA V. FOSTER, PETITIONER

vs.

MICHAEL FOSTER, RESPONDENT

AMENDED
MOTION TO ADJUDICATE CONTEMPT

By order of this Court dated August 12, 1987, the Respondent was found to have committed or threatened an intrafamily offense within the meaning of D.C. Code Section 16-1001, et. seq. (1981) against the Petitioner. The order directed the respondent to observe certain conditions which he/she has failed to do, in that: The Petitioner is amending her motion filed on November 19, 1987 to include all incidents in that motion in addition to the following: (See Attached)

WHEREFORE, the Petitioner asks the Court that a hearing be set on these charges and that a Notice of Hearing and Order directing appearance be issued requiring the respondent to appear in Court to answer these charges and to give any testimony required by the Court. Also, that following the hearing, the Court find the Respondent in contempt of the prior Court order and make all further rulings as the Court finds appropriate.

Date: 5/24/88 /s/ M.E. Foxworth
Deputy Clerk/Corporation Counsel

VERIFICATION

District of Columbia, ss:

Ana V. Foster, being first duly sworn, states that he/she is the Petitioner, that he/she has read and understands the contents of this motion, and that it is true to his/her knowledge or belief.

/s/ Ana V.C. Foster
Petitioner

Subscribed and sworn to before me this 24th day of May, 1988.

/s/ ME. Fox Won
Notary Public/Corporation
Counsel/Deputy Clerk

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION
INTRAFAMILY AND NEGLECT BRANCH

IF No. 630-87

ANA VIRGINIA FOSTER, PETITIONER

VS.

MICHAEL FOSTER, RESPONDENT

CONTINUATION OF MOTION TO ADJUDICATE CONTEMPT

1. On 5/21/88 at 1:45 PM at 1601 Argonne, Respondent threw Petitioner down basement stairs, kicking her body. Respondent also pushed her head into the floor causing head injuries. Petitioner lost consciousness.

2. On 5/22/88 Respondent threatened to kill her. He was armed.

3. On or about 5/18/88 Petitioner went to 3636 16th St. #A868. Respondent had shredded the furniture and smashed the television at that address.

4. From 11:50 PM on 5/16/88 to 1:30 on 5/17/88, Respondent kidnapped Petitioner and a taxi driver and forced them to drive around Rock Creek Park and to Silver Spring in a taxi. About 1:30 AM, the Montgomery County police stopped them. Respondent called 1601 Argonne threatening to kill the Petitioner.

5. Throughout April and May 1988 at 3636 16th St. #A868. Respondent verbally abused Petitioner.

6. On or about 03/26/88 at 1601 Argonne, Respondent called threatening Petitioner.

7. On or about January or February 1988, Respondent called and said that he would kill the Petitioner's family if she (the Petitioner) didn't let him come back to her.

8. On or about January 14 Respondent told Petitioner that four men were watching her and that one was going to kill her.

Respectively Submitted,

/s/ LESLYE E. ORLOFF

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Latina/Ayuda
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/s/ ANA V. C. FOSTER

Ana Virginia Foster

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION

Case Number IF-630-87

ANA FOSTER

v.

MICHAEL FOSTER

Case Number IF-631-87

ELVIRA RIVAS

v.

MICHAEL FOSTER

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Washington, D.C.
August 8, 1988

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[8] • • • • •

MR. SIGNET: Your Honor, I would bring to the Court's attention the fact that there is a pending body of matter as an outgrowth of these events, that went before the — that went to the grand jury.

THE COURT: Did it? Okay.

[9] MS. ORLOFF: That's true, Your Honor. In fact, some of the witnesses we had subpoenaed will probably not be called for that reason, because the U.S. Attorney has asked us not to call the officers unless we really need them.

THE COURT: All right. Okay.

• • • • •

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION

Case Number IF-630-87

ANA FOSTER

v.

MICHAEL FOSTER

Case Number IF-631-87

ELVIRA RIVAS

v.

MICHAEL FOSTER

VOLUME III OF III

Washington, D.C.
August 10, 1988

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[309] • • • • •

MR. SIGNET: Your Honor, in that this is essentially a criminal proceeding, we would move at this time for a judgment of acquittal on all counts.

The witnesses have testified in a rambling manner with very few specifics about any features of the Civil Protection Orders in either case.

The series of telephone calls were essentially unsubstantiated in that there was nobody who either [310] monitored the call or could testify they heard the call, other than the petitioners.

With regard to the events of the 21st of May, during cross examination and then in redirect, Ms. Foster presented several different versions of it.

Mr. Collins, who is the security guard, desk clerk at the apartment building, made a thorough search of the building and the only person he encountered in the building that he did not know was a gentleman with a machete who he did not identify as Michael Foster.

He was the only person down there who had either the opportunity or the capability, based on Mr. Collins's testimony, to subject Ms. Foster to the injuries.

We have had conflicting testimony from Mrs. Foster, where she was in regard to the door. She testified later in the trial hearing that she could not see the door from where her apartment was.

We have seen that both in the sketch done at the time of the cross examination and in the view of the photographs taken later in that day.

One could not see the door to that stairwell from the apartment door to Mrs. Foster's and Mrs. Rivas's apartment.

The other witnesses have testified that none of [311] them observed any of the activities that were claimed by – claimed by Mrs. Foster to have occurred. We don't dispute the fact that she was injured. We stipulated to the medical reports of both incidents where she was taken to the hospital.

We do not believe, however, that the Petitioner has shown that Michael Foster was in fact the person who perpetrated these incidents, nor made any telephone calls.

In regard to Ms. Rivas, she has testified that she hung up the phone before identifying who the person on the phone was. She reacted to the phone calls in a very brusque manner, just shutting them off and turning—hanging the phone up.

We have also established that she understands very little English, that she would have any communication with Michael Foster through essentially an interpreter, a family member who would speak in a very limited conversation with her.

We don't believe the evidence presented by Mrs. Rivas or by Mrs. Foster shows beyond a reasonable doubt that Michael Foster was in fact either there or committed any of the alleged occurrences.

And we move for a judgment of acquittal on all counts.

THE COURT: Let me just glance through something [312] a minute.

MS. ORLOFF: Your Honor, it is our position that the witnesses that we have presented as to the various incidents have been credible and that their testimony has supported each other. They have been complementary and non-contradictory.

So, it is our position that our clients' testimony held up on cross, by and large, and that in fact we have provided sufficient evidence to prove beyond a reasonable doubt that Michael Foster—

THE COURT: Well, that's not the test right now. Now we're at the prima facie case level.

MS. ORLOFF: We believe we have made our prima facie case, with the exception—there are a few incidents which I would be willing to concede at this point.

THE COURT: Why don't you just do that, because it will make it easier for Mr. Signet in how he approaches his defense.

MS. ORLOFF: That would be fine.

THE COURT: I have before me—at your suggestion I Xeroxed it out of the file, the request for the extention of the Civil Protection Order in both cases, in which they set forth the series of—the points which both sides pretty much followed.

[313] If there's something other than that, I'll dig it out of the file. But I have those before, so why don't you just—that's 34 A, B, C, D.

Why don't you just go through that and identify the points that you do not wish to proceed on and that will make it easier for both of us.

MR. SIGNET: Okay. Could we start with Petition for Ms. Foster.

MS. ORLOFF: That's what I—

THE COURT: Okay.

MS. ORLOFF: 4-I, which is January and February.

That was the answer that her testimony on here states, that we weren't able to get the Officer.

THE COURT: All right.

MS. ORLOFF: 4-L, the May, June verbal abuse.

THE COURT: All right.

MS. ORLOFF: 4-O, which is the threat to kill while—

MR. SIGNET: That's the first four of them?

MS. ORLOFF: Yes.

THE COURT: Yes, because it's kind of, O, P, O, P, so we'll make that "Q" and "R," the last two numbers for record purposes.

All right.

MS. ORLOFF: And the final one, Your Honor, is [314] an issue Your Honor has not allowed testimony over our objection, and that would be "N." We are not willing to cede on it, but it is my understanding that that's on that Your Honor may—

THE COURT: I have already ruled on that one.

MS. ORLOFF: It's over my objection.

THE COURT: Sure.

And in Ms. Rivas's case, we're ready. We believe that we've met our burden on all of them.

I will point out to Your Honor, something that I want to clarify for the record. Some of these incidents in Ms. Rivas's case were violations of her order.

She didn't see them personally. Other family members testified to them in court.

THE COURT: I understand that.

MS. ORLOFF: We believe that—

THE COURT: How about "E"? What is your theory on "E"?

MS. ORLOFF: Well, Your Honor, in the past, as she testified before—today, there were at least two months in which she received, after the Civil Protection Order there were at least two months in which she said she received phone calls which contained threats to kill.

I understand that those allegations in and of themselves are not contained in—

[315] THE COURT: Right.

MS. ORLOFF: —the petition. It's probably, I believe, an oversight in our area office or in interviewing.

However, given that history, the fact that there were continual phone calls from him, which she was able to identify by voice and therefore shut down, and she did testify that they were excessive.

And Anna testified that they were excessive, Ms. Foster, that—so excessive that she needed to disconnect the phone. And that is a form of harassment.

THE COURT: She's not charged. It doesn't say in the protection order not to harass somebody.

MS. ORLOFF: Well, Your Honor, in the context of domestic violence, we would argue that it says, do not

molest, assault, or in any manner, any manner threaten or physically abuse.

And to the extent, given the history and the testimony that Your Honor that Your Honor has heard today about the history of this case, and we're only talking now about August forwards. There is history that precedes this that we have not—that that, and given the history of telephone threats, the continuous calling is a form of a threat.

In any manner—and there are manners which threats can take, in the context of the relationship between [316] the parties, that that behavior could be seen as a threat. And that's what we've done.

THE COURT: I suppose on a pure legal point I would agree with you. But I also think in a criminal case, the defendant is entitled to more specific notice of the nature of the charge and I don't think that to allege harassment is like saying disorderly, without saying what it means.

But, it's too vague, so the Court will not consider "E" as relates to Elvira's.

The Court will deny the motion as to the wife, Anna's petition, except at this time, based on the burden of proof level, the Court will grant the motion as to "F."

And as to "H," the Court is not satisfied if those words as such, in spite of the context of this dispute, constitutes a legal threat.

MS. ORLOFF: Your Honor, would it be possible for me to address them?

THE COURT: No. I'm not going to hear anything further.

MS. ORLOFF: Will Your Honor note my objection?

THE COURT: Sure.

There is on count "M," the Court is not satisfied that there was any kidnapping or illegal conduct as relates to that event. And there was no evidence, that [317] the Court

notes on that, and there was a subsequent call that night of a threat to kill.

So, the Court will grant the motion as to that count and deny it at this time.

As to all other counts, and you can proceed when ready.

MR. SIGNET: Just so I make sure, you are granting the motion that Ms. Rivas—I mean, Ms. Foster, F, H. and I?

THE COURT: F, H, and—well, "I" was withdrawn. I'm granting it as to "M."

I granted the motion on "M" and she sought to withdraw, which is tantamount to a Judgment of Acquittal. They are declining to seek forward, so in order that jeopardy would attach to the Judgment of Acquittal would be granted for each of those that they—that Petitioner elected not to proceed forward, as well as the ones the Court has ruled on.

MR. SIGNET: So, we have essentially done away with F, H, I?

THE COURT: You're going a little fast.

MR. SIGNET: Oh, I'm sorry.

THE COURT: F, yes. H, yes. I, yes, L, yes.

MR. SIGNET: "M"?

THE COURT: "N" as in—

[318] MR. SIGNET: "M" as in Michael.

THE COURT: No, "N" as in—"M" as in Mike, "N" as in Nan, and "O" was withdrawn so "O" is out.

All others remain as to Anna Foster and as to Eilvira Rivas. The "E" is out and all others remain at this time under the burden of proof level of prima facie case.

* * * * *

[400] (Whereupon, a brief recess was taken.)

THE DEPUTY CLERK: This Court is back in session, Honorable Judge Murphy presiding. Please come to order.

THE COURT: First, I'd like to thank the Interpreters for their assistance to the Court, not only those present but also Mr. Galvan.

Having no knowledge of the Spanish language, it's enormously important and I found the interpretations seemed to pick up, not only the literal language but some of the nuances, particularly valuable in a case of this nature where there are a lot of personal relationships between the parties.

So, I'm grateful for the services of the Interpreters as well as that of counsel.

[401] Mr. Foster, would you please stand.

Mr. Foster, you're before the Court on what has been a series of criminal allegations, conduct which is alleged to be in violation of the orders of Judge Tignor which, if violated willfully and deliberately, constitute a criminal contempt which is punishable like any other crime even though we're in kind of the civil family side of the Court.

The Court is satisfied that, beyond a reasonable doubt, that you violated the Court's order on four occasions. The Court is not satisfied beyond a reasonable doubt of the other alleged incidents, or they are too vague and lacking in specificity to justify the remedy of a criminal conviction.

In Case 630 involving your wife, the Court is satisfied beyond a reasonable doubt that within the District of Columbia, on September 17th, 1988, you in fact threatened her by saying to her the words, "I'm going to beat your ass."

The Court is satisfied beyond a reasonable doubt that you did, contrary to your testimony, assault your wife near Kalorama Park, 11/6/87, that leading to the injuries described and testified to.

The Court is also satisfied beyond a reasonable doubt that you committed the assault alleged to have [402] occurred, and the Court is satisfied did in fact occur on May 21st, 1988 at the Argonne address, which led to your wife's hospitalization.

As relates to 631, the case involving your mother-in-law, the Court is satisfied beyond a reasonable doubt that on

November 4th, 1987, you did visit the premises in violation of the stay-away order.

This Court found beyond a reasonable doubt of the assault on the 6th of November, the Court believes that that event merged with the contempt involving your wife and did not justify a separate action by the Court.

The Court just did not find, in large measure, your testimony credible. It defies common sense. On the other hand, the testimony of your wife and some of her witnesses was significantly exaggerated and overstated, both credibility and exaggeration being commonplace in cases of this nature.

As relates to the order, involving the stay away order, I've already ruled as to your mother-in-law. As to the one involving your wife, I will order a stay away from the home, person or workplace.

I will not include telephone calls but you will appreciate the consequences of contact that could lead to new allegations that could put you back in trouble again. So, I'll leave that to your own discretion, but I do not [403] believe that barring telephone calls per se are justified in this case in spite of what has occurred.

Now, counsel, what is Mr. Foster's status in the system? Obviously he's in custody, but I assume that's regarding the matter that they brought him back from Phoenix on, because there isn't any bond or anything in these jackets.

MR. SIGNET: He was under a $20,000 bond in a felony case, Your Honor. He was also placed on a $5,000 bond in each of these two cases—

THE COURT: I don't remember that being on the jacket.

MS. ORLOFF: By Judge Morrison.

THE COURT: Is that shown on the jacket?

MS. ORLOFF: She did the last entry prior to this one—the second to the last, prior to the—

THE COURT: Well, be that as it may, do you know—do you represent him on his criminal case?

MR. SIGNET: No, Your Honor. He's represented by Mr. Kravitz. I believe he's from PDS.

THE COURT: Okay. Do you know the status of those cases?

MR. SIGNET: I believe in that case there was a preliminary hearing. I don't know if the case was—

MS. ORLOFF: Your Honor, I know.

[404] THE COURT: Okay.

MS. ORLOFF: The indictment—the grand jury, not here, but the grand jury is scheduled for August 18th.

THE COURT: Oh, so is it—it's been held for the action of the grand jury but no action has been taken?

MS. ORLOFF: Right.

* * * * *

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION
INTRAFAMILY AND NEGLECT BRANCH

IF No. 630-87
SF No. 735804-OA

ANA V. FOSTER, PETITIONER

vs.

MICHAEL FOSTER, RESPONDENT

FINDING OF FACT, ORDER OF ADJUDICATION AND COMMITMENT

The motion to adjudicate the Respondent in contempt for failure to comply with the order of this Court dated Aug. 8, 1988.

FOUND, as a fact that the Respondent has failed and refused to obey the order of this Court in that on 9/17/87 threatened to do bodily harm to the petitioner, on 11/6/87 Respondent assaulted petitioner in the vicinity of Kalorama Park, on May 21, 1988 at 1601 Argonne Place Respondent assaulted Petitioner, although able to do so, by which reason Respondent is in contempt of this Court; therefore it is

ORDERED, that the United States Marshal in and for the District of Columbia is directed to take into his custody the Respondent, Michael Foster, and commit him to the District of Columbia Jail for a period of 450 days. consec. (150 days each count)

10/6/88 — Date

/s/ Tim Murphy — Judge

SUPERIOR COURT
OF THE
DISTRICT OF COLUMBIA
Holding a Criminal Term
Grand Jury Sworn in on November 21, 1988

Criminal No: F-8415-88
Violation: 22 D.C. Code 504; 2307; 501
(Assault; Threatening to Injure a Person;
Assault with Intent to Kill)

THE UNITED STATES OF AMERICA

v.

MICHAEL FOSTER

The Grand Jury charges:

FIRST COUNT:

On or about November 6, 1987, within the District of Columbia, Michael Foster unlawfully assaulted and threatened Ana Foster in a menacing manner. (Assault, in violation of 22 D.C. Code, Section 504)

SECOND COUNT:

On or about November 12, 1987, within the District of Columbia, Michael Foster threatened to injure the person of Ana Foster. (Threatening to Injure a Person, in violation of 22 D.C. Code, Section 2307)

THIRD COUNT:

On or about March 26, 1988, within the District of Columbia, Michael Foster threatened to injure the person of Ana Foster. (Threatening to Injure a Person, in violation of 22 D.C. Code, Section 2307)

FOURTH COUNT:

On or about May 17, 1988, within the District of Columbia, Michael Foster threatened to injure the person of Ana Foster. (Threatening to Injure a Person, in violation of 22 D.C. Code, Section 2307)

FIFTH COUNT:

On or about May 21, 1988, within the District of Columbia, Michael Foster assaulted Ana Foster with intent to kill her. (Assault with Intent to Kill, in violation of 22 D.C. Code, Section 501)

/s/ JAY B. STEPHENS
Attorney of the United States in and for the District of Columbia

A TRUE BILL:

Foreperson.

Supreme Court of the United States

No. 91-1231

UNITED STATES, PETITIONER

v.

ALVIN J. DIXON

ORDER ALLOWING CERTIORARI.

Filed April 27, 1992.

The petition herein for a writ of certiorari to the District of Columbia Court of Appeals is granted.

April 27, 1992

(3)

No. 91-1231

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges that are based upon the same conduct for which the defendant previously has been held in contempt of court.

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Cases—Continued: Page

Anderson v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821) 21
Ball v. *United States*, 470 U.S. 856 (1985) 17
Bartkus v. *Illinois*, 359 U.S. 121 (1959) 22
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Buckley v. *Valeo*, 424 U.S. 1 (1976) 19
Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)..... 33, 34
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Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 34
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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1231

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-20a) is reported at 598 A.2d 724. The opinions of the Superior Court of the District of Columbia in *Foster* (Pet. App. 21a-24a) and *Dixon* (Pet. App. 25a-57a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1991. The petition for a writ of certiorari was filed on January 29, 1992, and was

granted on April 27, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The pertinent District of Columbia statutes and rules are reprinted in an appendix to this brief.

STATEMENT

In each of these cases, the defendant violated a court order that prohibited him from engaging in certain conduct. In each case, the defendant was found to be in contempt of court for violating the order and was sentenced to a term of imprisonment. The defendant in each case was also indicted on substantive criminal charges arising from the same conduct for which he was held in contempt. The court of appeals dismissed the indictments, holding that criminal contempt proceedings, followed by prosecution for the same conduct, placed each defendant twice in jeopardy for the same offense, in violation of the Double Jeopardy Clause. Pet. App. 1a-20a.

1. *Foster.* On July 29, 1987, Foster's estranged wife, Ana, filed a petition in the Superior Court of the District of Columbia seeking a temporary protection order pursuant to D.C. Code Ann. § 16-1004(d) (1981). In support of her petition, she alleged that Foster had abused her repeatedly. Pet. App. 22a. On August 12, 1987, Foster consented to the entry of a one-year civil protection order (CPO) under D.C. Code Ann. § 16-1005(c) (1981). The court accordingly entered an order stating that Foster must not

"molest, assault, or in any manner threaten or physically abuse" his estranged wife. Pet. App. 4a; J.A. 18. The court also entered an order the same day forbidding Foster from engaging in any similar conduct toward his mother-in-law and ordering Foster to stay away from his mother-in-law's home and place of work. Pet. App. 4a.

Within a short time, Foster began violating the orders. On September 22 and November 19, 1987, and on May 24, 1988, Ana Foster filed motions seeking to have Foster held in contempt for 16 alleged violations of the CPO. Pet. App. 4a-5a; J.A. 19-20, 21-25, 26-29. Foster's mother-in-law also filed a motion seeking to have Foster held in contempt, alleging six violations of the CPO that prohibited Foster from threatening her. Pet. App. 5a. Ana Foster alleged that on September 17, 1987, Foster threatened to beat her, J.A. 19; on November 6, 1987, Foster "grabbed [her] and threw her against a parked car," J.A. 24; that on November 12, 1987, Foster called her at home and threatened to "blow out [her] brains," J.A. 24; that on March 26, 1988, Foster "called threatening [her]," J.A. 29; and that on May 17 he "called * * * threatening to kill [her]," J.A. 28. The most serious allegation was that on May 21 he "threw [her] down basement stairs, kicking her body," and "pushed her head into the floor causing head injuries," which resulted in her losing consciousness. *Ibid.*

The court heard evidence concerning the contempt charges at a three-day bench trial held on August 8-10, 1988. During the trial, eight witnesses testified. Ana Foster's counsel prosecuted the contempt. The United States did not participate in the trial. Pet. App. 5a & n.8. Foster was found guilty of four counts of criminal contempt, based on the November

6, 1987, and May 21, 1988, assaults on his wife, the September 17, 1987, threat against his wife, and the November 4, 1987, violation of the stay-away order relating to his mother-in-law. He was found not guilty of the remaining contempt charges, including those based on the alleged threats of November 12, 1987, March 26, 1988, and May 17, 1988. Pet. App. 6a-7a & n.10. He was sentenced to consecutive 150-day prison terms on each of the four counts on which he was convicted. See Pet. App. 2a.

Meanwhile, on July 21, 1988 (approximately two weeks before the contempt trial), the United States Attorney's office filed a complaint charging Foster with a single count of assault with intent to kill while armed, based on Foster's May 21, 1988, assault on his wife. On January 19, 1989, five months after the contempt trial, the grand jury returned a five-count indictment against Foster. Pet. App. 7a; J.A. 43-44. Count 1 charged Foster with simple assault on November 6, 1987, in violation of D.C. Code Ann. § 22-504 (1981). Count 5 charged him with assault with intent to kill on May 21, 1988, in violation of D.C. Code Ann. § 22-501 (1981). Counts 2, 3, and 4 charged him with threatening to injure Ana Foster on November 12, 1987, March 26, 1988, and May 17, 1988, in violation of D.C. Code Ann. § 22-2307 (1981). Counts 1 and 5 were based on the incidents for which Foster had been found guilty of criminal contempt; Counts 2, 3, and 4 were based on incidents for which Foster had been found not guilty of contempt after the criminal contempt trial. Pet. App. 7a-8a, 22a.

Foster moved to dismiss the indictment on double jeopardy and collateral estoppel grounds. The trial court denied the motion, holding that criminal contempt does not constitute the same offense as a sub-

stantive criminal charge based on the same conduct. Pet. App. 23a. In addition, the trial court relied on D.C. Code Ann. § 16-1002(c), which provides that "[t]he institution of criminal charges by the United States Attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under [the chapter regarding civil protection orders]." According to the court, that provision demonstrates "an intent by the legislature to allow two different remedies for a violation of Civil Protection Orders." The court explained that the contempt prosecution is "to protect the [party who obtained the order] and the ability of the Court to enforce its orders," and the substantive criminal prosecution is "to protect the community." Pet. App. 24a. The court did not rule on Foster's collateral estoppel arguments.

2. *Dixon.* On March 9, 1987, Dixon was arrested on a charge of second-degree murder while armed. Pet. App. 9a. The District of Columbia bail law provides that when an individual is released on bail, the judicial officer may impose any condition on the individual that "will reasonably assure the appearance of the person for trial or the safety of any other person or the community." D.C. Code Ann. § 23-1321(a) (1981). The judicial officer is directed to "issue an appropriate order containing a statement of the conditions imposed, if any, [and] shall inform such person of the penalties applicable to violations of the conditions of his release." D.C. Code Ann. § 23-1321(d) (1981). The bail law further provides that a person who has been released on bail and who has violated a condition of his release "shall be subject to revocation of release, an order of detention, and prosecution for contempt of court." D.C. Code Ann. § 23-1329(a) (1981).

Dixon was released on a $1500 surety bond. The printed release form stated that:

> You are hereby released on the conditions indicated below: These conditions will be in effect until your case is disposed of or until they are changed or amended by a judge. * * * You are to refrain from committing any criminal offense, the penalties for which are explained on the reverse side of this Order.

J.A. 8. On the reverse side, the order stated that "[y]ou are not to commit any criminal offense," and that "[a]ny violation of these conditions shall subject you to revocation of release, an order of detention, and prosecution for contempt of court." Pet. App. 9a, 26a.

In January 1988, while Dixon was awaiting trial on the murder charge, he was arrested and charged with possession of cocaine with intent to distribute it, in violation of D.C. Code Ann. § 33-541(a)(1) (1981). The government then filed a motion to modify the terms of Dixon's release on the murder charge, and the Superior Court judge ordered Dixon to "show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified." J.A. 13. A two-day hearing was held on the show cause order. An Assistant United States Attorney examined witnesses concerning the cocaine charges, and the witnesses were cross-examined by Dixon's counsel. At the end of the hearing, the court concluded "that the government has established, beyond a reasonable doubt, that [Dixon] was in possession of drugs and that those drugs were possessed with the intent to distribute them." J.A. 15. Accordingly, the court found Dixon guilty of criminal contempt under D.C. Code Ann. § 23-1329(c) (1981) and sentenced him to 180 days in jail. J.A. 16.

Dixon thereafter moved to dismiss the cocaine indictment on double jeopardy grounds. The trial court granted the motion, Pet. App. 57a, rejecting the government's arguments that contempt of court and possession of cocaine with intent to distribute it are different offenses for purposes of the Double Jeopardy Clause. Pet. App. 31a, 33a-35a. The court recognized that "its decision may pose some difficult questions regarding the interaction of judges and prosecutors in initiating criminal proceedings," because a judge's decision to go forward with criminal contempt proceedings "would preclude the defendant from being tried for the underlying offense." Pet. App. 56a-57a.

3. Foster took an interlocutory appeal from the trial court's denial of his motion to dismiss his indictment, and the government appealed from the dismissal of the indictment in Dixon's case. After each case was separately briefed and argued, the District of Columbia Court of Appeals consolidated the two cases, reheard them *en banc*, and ruled that both prosecutions were barred by the Double Jeopardy Clause. Pet. App. 1a-20a.

The court of appeals concluded that this Court's decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990), "control[led]" these cases and "greatly simplified the issues." Pet. App. 13a-14a. The court explained that because the conduct on which the contempt proceedings were based was the same conduct for which the government subsequently sought to prosecute the defendants, the Double Jeopardy Clause, as interpreted in *Grady* v. *Corbin*, barred the government from proceeding with the criminal charges. Pet. App. 15a-16a. The court observed that criminal contempt "is a crime in the ordinary sense," Pet. App. 18a (quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)), and that "the impact of a contempt prosecution on any defendant

• • • would be the same regardless of whether the contempt adjudication is sought by the government or a private party." Pet. App. 19a.

SUMMARY OF ARGUMENT

A. Prior to *Grady* v. *Corbin*, this Court and the overwhelming majority of lower courts had held that successive prosecutions for contempt and for a substantive offense based on the same conduct were permissible. Those decisions rested on three grounds, all of which remain sound today.

First, the offense of criminal contempt has entirely different elements from substantive offenses such as the crimes with which respondents were charged in this case. In accordance with the "elements" test that has traditionally been used to determine whether two offenses should be considered the "same offence" within the meaning of the Double Jeopardy Clause, contempt and the substantive offenses are properly held to be legally distinct, even when the two offenses are based on the same conduct.

Second, the interest protected by a prosecution for contempt is solely the interest of the court in vindicating its authority; the interest protected by a prosecution for substantive offenses, such as those at issue here, is the general social interest in protecting individuals and maintaining order in the community. For that reason as well, contempt should not be regarded as the same offense as a substantive charge that is based on the same conduct.

Third, the judiciary has the authority to prosecute a defendant for contempt without the participation—and indeed even over the objection—of the Executive Branch. If criminal contempt were considered the same offense as a substantive offense based on the same conduct, the courts could effectively preempt—

at the expense of core separation of powers principles—the authority to prosecute violations of the criminal law.

B. This Court's decision in *Grady* v. *Corbin* does not require departure from the established principle that criminal contempt is a different offense from a substantive crime that is based on the same conduct. *Grady* involved a single traffic accident that led to successive prosecutions, the first for traffic violations and the second for negligent assault and involuntary manslaughter. Although the traffic violations were not technically lesser included offenses of assault and manslaughter, they bore an analogous relationship, and the Court concluded that the double jeopardy principles applicable to lesser included offenses should be applied to the offenses at issue in *Grady* as well.

The offenses at issue in the present case arise in an entirely different context. The legal definitions of the offenses make clear that criminal contempt is not an aggravated form of the substantive offenses with which respondents were charged; the substantive offenses are thus not in any sense lesser included offenses of the crime of contempt. Accordingly, the holding of *Grady* does not extend to this case.

Although the language that the *Grady* Court used to describe the applicable double jeopardy test is broad enough to cover this case, we submit that the Court should not apply that language to bar the substantive charges at issue here. This Court has already determined in *United States* v. *Felix*, 112 S. Ct. 1377 (1992), not to read the language of *Grady* "expansively." An expansive reading of that language in this case would be improvident for the same reasons: it would upset well-established principles of double jeopardy law in a manner that the Court in *Grady* could not likely have intended.

C. If the Court determines that *Grady* compels the result reached by the court of appeals, then *Grady* should be reconsidered. The formulation that the Court devised in *Grady* to determine when successive prosecutions violate the Double Jeopardy Clause is not well founded in the language or history of the Double Jeopardy Clause; it is inconsistent with the precedents of this Court; and it is complex and difficult to apply. Because the formulation in *Grady* does not accurately capture the meaning of the term "same offence" in the Double Jeopardy Clause, the Court should not follow that formulation. If, however, the Court believes that adherence to *Grady* would compel affirmance in this case, it should reconsider and overrule *Grady*.

ARGUMENT

CONTEMPT OF COURT AND A SUBSTANTIVE CRIMINAL OFFENSE BASED ON THE SAME CONDUCT ARE NOT THE "SAME OFFENCE" FOR PURPOSES OF THE DOUBLE JEOPARDY CLAUSE

A. This Court's Cases Establish That The Double Jeopary Clause Does Not Preclude Successive Prosecution Of A Defendant For Contempt Of Court And A Substantive Offense Based On The Same Conduct

1. Almost a century ago, this Court expressed the view that a conviction for criminal contempt does not bar a subsequent prosecution for a substantive criminal offense. In *In re Debs*, 158 U.S. 564 (1895), the defendant was held in criminal contempt for violating an injunction. In the course of upholding the judicial power to punish contempt summarily, the Court stated that if a criminal prosecution should be brought against the defendants for the same conduct, "it will be no defence to such prosecution that they have disobeyed the orders of injunction served

upon them and have been punished for such disobedience." 158 U.S. at 594; see also *id.* at 599-600 ("the penalty for a violation of injunction is no substitute for and no defence to a prosecution for any criminal offences committed in the course of such violation"); *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 330 (1904) (quoting above language).[1]

Two years after the *Debs* decision, the Court reiterated the same principle in a case involving Congress's contempt power. In *In re Chapman*, 166 U.S. 661 (1897), the defendant was indicted for refusing to answer questions put to him by a congressional committee. The defendant argued that, since Congress itself had the power to punish the same conduct as contempt, the statute impermissibly subjected witnesses to being twice put in jeopardy for the same offense. The Court rejected that argument, observing that "indictable statutory offences may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together." 166 U.S. at 672. Accord *Jurney* v. *MacCracken*, 294 U.S. 125, 151 (1935).[2]

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[1] In *Bloom* v. *Illinois*, 391 U.S. 194 (1968), the Court rejected the holding in *Debs* that courts have inherent power to punish serious contempts summarily. *Bloom* did not, however, overrule *Debs* entirely. See *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481, 787, 796 n.8 (1987). Moreover, the Court in *Bloom* had no occasion to reconsider the statement in *Debs* that the same conduct could give rise to successive prosecutions for criminal contempt and a substantive criminal offense.

[2] In 1834, the Attorney General published an opinion to the same effect in connection with an incident involving an assault by General Sam Houston on a Member of the House of Representatives. General Houston was first punished for contempt

Prior to this Court's decision in *Grady* v. *Corbin*, the great majority of state and federal courts agreed that double jeopardy principles do not prohibit successive prosecutions for criminal contempt and substantive criminal offenses based on the same conduct. Although the issue did not arise frequently in the federal system, every court of appeals that addressed the issue adopted the majority view.[3] Similarly, every

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of Congress and was then convicted of the crime of assault. The Attorney General expressed the view that the contempt and the substantive criminal violation were not the "same offence" for double jeopardy purposes, and that the contempt proceedings therefore posed no bar to the subsequent indictment and conviction. The power of contempt, the Attorney General explained, is possessed by courts and other bodies "for the purpose of protecting themselves in the due exercise of their appropriate functions, and not for the purpose of vindicating the general law of the land, which may also have been violated by the same act." 2 Op. Att'y Gen. 655-656 (1834).

[3] Several of the cases involved disobedience of court orders directly analogous to those in this case. See *Orban* v. *United States*, 18 F.2d 374 (6th Cir. 1927); *Hansen* v. *United States*, 1 F.2d 316 (7th Cir. 1924); see also *Lewinsohn* v. *United States*, 278 F. 421, 428 (7th Cir. 1921), cert. denied, 258 U.S. 630 (1922). Other cases involved conduct otherwise found contemptuous. See *O'Malley* v. *United States*, 128 F.2d 676, 684 (8th Cir. 1942) (misrepresentation to court), rev'd on other grounds *sub nom. Pendergast* v. *United States*, 317 U.S. 412 (1943); *United States* v. *Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971) (assaulting prosecutor; summary contempt); *Merchants' Stock & Grain Co.* v. *Board of Trade*, 201 F. 20, 27 (8th Cir. 1912). See also *United States* v. *Ferrugia*, 604 F. Supp. 668, 672-673 (E.D.N.Y. 1985) (summary contempt); *United States* v. *Mirra*, 220 F. Supp. 361 (S.D.N.Y. 1963) (assault on prosecutor during trial; summary contempt); *Chicago Directory Co.* v. *United States Directory Co.*, 123 F. 194 (C.C.S.D.N.Y. 1903) (submission of false documents to court). Contra *United States* v. *Haggerty*, 528 F. Supp.

state supreme court to consider the issue prior to *Grady* held that the Double Jeopardy Clause does not bar separate prosecutions for contempt of court and substantive criminal violations based on the same act.[4]

1286, 1295 (D. Colo. 1981) (contempt proceeding for violating injunction against striking against government and prosecution under statute prohibiting such strikes); *United States* v. *United States Gypsum Co.*, 404 F. Supp. 619 (D.D.C. 1975) (contempt proceeding for violating injunction against price-fixing and prosecution for substantive antitrust violation).

[4] A number of those cases arose from facts virtually identical to those presented in *Foster*. See, *e.g.*, *State* v. *Newell*, 532 So. 2d 1114 (Fla. Dist. Ct. App. 1988); *People* v. *Totten*, 514 N.E.2d 959 (Ill. 1987); *Commonwealth* v. *Allen*, 486 A.2d 363 (Pa. 1984), cert. denied, 474 U.S. 842 (1985); *State* v. *Sammons*, 656 S.W.2d 862 (Tenn. Crim. App. 1982). Other cases addressed a variety of fact patterns in which a single act constituted both criminal contempt of court, committed either by violation of a court order or by other contemptuous conduct, and a substantive criminal violation. See *Middlebrook* v. *State*, 43 Conn. 257, 267 (1876); *State* v. *Chapman*, 739 P.2d 310 (Idaho 1987) (violation of court order by kidnapping daughter); *Long* v. *Commonwealth*, 197 S.W. 843 (Ky. 1917) (summary contempt for assaulting witness outside court and criminal assault); *Commonwealth* v. *Gallarelli*, 362 N.E.2d 923 (Mass. 1977) (conspiracy to bribe juror); *Church* v. *State*, 111 So. 2d 228 (Miss. 1950) (violation of injunction by committing liquor law violations); *State* v. *Yancy*, 4 N.C. (Car. L. Rep.) 133 (1813) (summary contempt for assault in court); *Maples* v. *State*, 565 S.W.2d 202 (Tenn. 1978) (summary contempt for instituting fraudulent proceeding and giving false testimony); *Barrowman* v. *State ex rel. Evans*, 381 S.W.2d 251 (Tenn. 1964) (violation of injunction by committing liquor law violations); *Nicholas* v. *Commonwealth*, 45 S.E.2d 305 (Va. 1947) (violation of injunction by committing liquor law violations); see also *Ex parte Morris*, 227 P. 914, 915-917 (Cal. 1924); *Ex parte Allison*, 90 S.W. 870 (Tex. 1906) (violation of injunction by committing gambling law violations); *Fisher* v. *McDaniel*, 64 P. 1056 (Wyo. 1901)

That view reflects the common law practice as well. See F. Wharton, *Criminal Pleading and Practice* § 444, at 309 (9th ed. 1889); *Rex* v. *Lord Ossulston*, 93 Eng. Rep. 1063 (K.B. 1738).[5]

2. Sound reasons underlay the overwhelming pre-*Grady* consensus that the offense of criminal contempt is not the same as a substantive offense based on the same conduct. Those reasons are fully applicable to this case.

a. Many of the pre-*Grady* decisions relied on the fact that the elements of criminal contempt are entirely different from the elements of the substantive criminal offenses at issue in those cases and that contempt and the substantive offenses in question were thus not "the same offense" under the traditional "elements" test that this Court described in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). See, *e.g.*, *United States* v. *Ferrugia*, 604 F. Supp. at 672-673; *People* v. *Totten*, 514 N.E.2d at 965; *Commonwealth* v. *Gallarelli*, 362 N.E.2d at 926; *Commonwealth* v. *Allen*, 486 A.2d at 368-370. Apply-

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(bribing a witness). Contra *State* v. *Hope*, 449 So. 2d 633 (La. Ct. App. 1984). Compare *State* v. *Thompson*, 659 P.2d 383, 387 (Ore. 1983) (decision based on nonconstitutional, state statutory grounds).

[5] Neither *Colombo* v. *New York*, 405 U.S. 9 (1972) (per curiam), nor *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam), is to the contrary. In *Colombo*, the defendant was first found guilty of criminal contempt for refusing to testify before a grand jury and then indicted under another criminal contempt provision of the state criminal code. This Court remanded for a determination whether the indictment was for the same refusal to testify. *Menna* apparently involved a similar fact pattern, and the case was similarly remanded to the New York Court of Appeals for "a determination of petitioner's double jeopardy claim on the merits," on which this Court "express[ed] no view." 423 U.S. at 63.

ing that test to this case, the result is clear. The elements of criminal contempt are (1) a court order made known to the defendant, followed by (2) willful violation of that order. See *In re Gorfkle*, 444 A.2d 934, 939 (D.C. 1982). Neither element of contempt of court would necessarily be satisfied by proof that a defendant had committed the substantive offenses with which respondents are charged (simple assault, threats, and assault with intent to kill, in Foster's case; possession of cocaine with intent to distribute it, in Dixon's case). Similarly, no element of any of the substantive offenses at issue here would necessarily be satisfied by proof that a defendant was guilty of contempt of court.

Respondents argued below that the *Blockburger* test should be applied not to the statutory elements of the offenses charged, but rather to the facts that must be proved under a particular indictment. See Foster C.A. Br. 9-16; Dixon C.A. Br. 9-17. That interpretation of *Blockburger* is mistaken. The formulation the Court employed in *Blockburger* itself turns on the facts that the statute requires to be proved, not those that become relevant in a given case: two offenses are different if "each *provision* requires proof of a fact which the other does not." 284 U.S. at 304 (emphasis added). See also *Grady* v. *Corbin*, 495 U.S. at 516, 520; *id.* at 528 (Scalia, J., dissenting); *United States* v. *Woodward*, 469 U.S. 105, 108 (1985) (per curiam); *Albernaz* v. *United States*, 450 U.S. 333, 337-338 (1981); *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975); *Gore* v. *United States*, 357 U.S. 386 (1958).

b. Other pre-*Grady* decisions emphasized that the interest underlying criminal contempt—the vindication of the court's authority to enforce its orders—

is entirely distinct from the interests promoted by substantive criminal statutes that contain general prohibitions against particular classes of antisocial conduct. See, *e.g.*, *Ex parte Morris*, 227 P. at 916; *Long* v. *Commonwealth*, 197 S.W. at 843-844; *State* v. *Sammons*, 656 S.W.2d at 868. The purpose of criminal contempt is to enable the court to enforce its orders. *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987); see also *United States* v. *Providence Journal Co.*, 485 U.S. 693, 701-702 (1988). As this Court has stated, the power to punish for contempt is "inherent in all courts," because "its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of * * * judgments * * * and consequently to the due administration of justice." *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874). See also *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) ("[t]o fine for contempt—imprison for contumacy—inforce the observance of order * * * are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others"); *Michaelson* v. *United States*, 266 U.S. 42, 65 (1924); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

The fact that courts retain power to punish criminal contempts "should not obscure the fact that [contempt] proceedings are not intended to punish conduct prescribed as harmful by the general criminal laws," but are rather "to serve the limited purpose of vindicating the authority of the court." *Young*, 481 U.S. at 800.[6] Thus, the interest protected by the crim-

[6] An early decision by the North Carolina Supreme Court made this point succinctly, as applied to an assault that was the subject of both a summary contempt proceeding and an indictment: "Although but one injury is done to the individual assaulted, yet the same act constitutes two public offenses; which, according to the circumstances, might require different degrees of punishment. * * * One offense violates the law which protects courts of justice, and stamps an efficient character on their proceedings; the other is levelled against the general law, which maintains the public order and tranquillity." *State* v. *Yancy*, 4 N.C. (Car. L. Rep.) at 133-134.

inal contempt sanction is far different from the interests protected by substantive criminal statutes such as the ones under which Foster and Dixon were prosecuted. The interests promoted by those statutes are those of the community as a whole through the protection of its members from physical violence (in Foster's case) or the evils of drugs (in Dixon's case).

This Court has repeatedly recognized that the interests protected by particular criminal statutes is an important factor to be taken into account in determining whether those statutes define the same or different offenses. For example, in *Albernaz* v. *United States*, 450 U.S. 333, 343 (1981), the Court noted that its conclusion that the two drug conspiracy statutes at issue in that case defined distinct offenses "[was] reinforced by the fact that the two conspiracy statutes are directed to separate evils." See also *United States* v. *Woodward*, 469 U.S. 105, 109 (1985) (per curiam) (statutes designed to protect against separate evils authorize cumulative punishment); *Ball* v. *United States*, 470 U.S. 856, 864 (1985) (statutes not directed to separate evils do not authorize cumulative punishments). Because the interest protected by a criminal contempt prosecution differs so dramatically from the interests protected by prosecution for a general substantive offense, the court of appeals' holding that the two are the "same offense" is incongruous.

c. Finally, in addition to the different interests protected by the criminal contempt power and substantive criminal statutes, the court's control over criminal contempt prosecutions has been cited as a reason for permitting separate prosecution of substantive criminal offenses. *Commonwealth* v. *Allen*, 486 A.2d at 367. It is typically the court that "makes the initial decision that a contempt prosecution should proceed." *Young*, 481 U.S. at 807. Moreover, the court typically retains substantial control over the prosecution of contempts, for even if the court initially refers the matter to the Executive Branch for prosecution, the court may "exercise its inherent power of self-protection" to appoint its own prosecutor if the Executive Branch declines to pursue the case. *Young*, 481 U.S. at 801.

The facts of this case underscore the significance of the court's independent role in contempt proceedings. In *Foster*, no representative of the Executive Branch participated in the contempt prosecution. See Pet. App. 5a & n.8. In *Dixon*, the United States Attorney moved to modify the conditions of the defendant's pretrial release after the defendant had been apprehended on the drug charge. It was the trial court, however, that took the initiative in ordering the defendant to "show cause why he should not be held in contempt" and ultimately decided after the hearing to punish the defendant for contempt of court. Pet. App. 10a. Thus, the court (and, in *Foster*, the private complainant) initiated the contempt proceedings and retained the authority to continue or to terminate the contempt prosecutions.

In light of the court's role in prosecuting criminal contempt cases, to hold that a criminal contempt proceeding bars a subsequent prosecution for a substantive offense would give a court substantial power

over the prosecution of non-contempt cases, in tension with separation of powers principles. A primary constitutional responsibility of the Executive Branch is to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. That responsibility has long been understood to encompass the responsibility for initiating and prosecuting criminal cases. *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); see *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979) (citing cases). This Court has accordingly ruled that a court may not exercise control over the basic decisions concerning whether to prosecute a given defendant and what charges to press against that defendant, see, *e.g.*, *United States* v. *Thompson*, 251 U.S. 407, 414-415 (1920), unless those decisions are made in violation of some provision of law. Even where such a violation is suspected, the judicial inquiry must be narrowly tailored to protect the Executive Branch's prosecutorial function. *Wayte* v. *United States*, 470 U.S. 598, 607-608 (1985); *United States* v. *Goodwin*, 457 U.S. 368, 380 n.11 (1982); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980).

Under the court of appeals' decision, however, a court by initiating a criminal contempt prosecution could preclude the Executive Branch from exercising its power to prosecute violations of the criminal law.[7]

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[7] Similarly, it would appear that, under the court of appeals' decision, the Executive Branch by initiating a prosecution of

In *Foster*, for example, the decisions of the private complainant and the court to initiate contempt proceedings against the defendant for violating the civil protection orders would preclude the United States from prosecuting him for a number of serious criminal offenses, including assault with intent to kill. Similarly, in *Dixon*, the decision of the court to hold the defendant in contempt for violating the conditions of the court's pretrial release order would preclude the United States from prosecuting him for a serious drug violation. The harm is particularly clear in this case, because the criminal contempt offenses applicable to Foster and Dixon were petty offenses, for each of which the defendants faced a maximum of only six months' imprisonment, while the substantive crimes with which they were charged were serious felonies for which they were exposed to lengthy prison terms.[8]

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a defendant on substantive offenses could preclude a court from proceeding against the defendant on contempt charges. That result, too, would threaten constitutional separation of powers principles.

[8] Under District of Columbia law, the maximum penalty for violating a civil protection order is six months' imprisonment and a $300 fine. D.C. Superior Court Rules Governing Intrafamily Proceedings 12(e). The maximum penalty for violating a pre-trial release order is six months' imprisonment or a $1,000 fine. D.C. Code Ann. § 23-1329(c) (1981). In the criminal proceedings, Foster was charged with simple assault, in violation of D.C. Code Ann. § 22-504 (1981) (maximum 1 year of imprisonment and $500 fine), three counts of threatening to injure a person, in violation of D.C. Code Ann. § 22-2307 (1981) (maximum 20 years' imprisonment and a $5,000 fine each), and one count of assault with intent to kill, in violation of D.C. Code Ann. § 22-501 (1981) (maximum 15 years' imprisonment, with a minimum of 2 years' imprisonment). Dixon was charged with possession of cocaine with intent to distribute it, in violation of D.C. Code Ann. § 33-541(a)(1) (1981) (maximum 15 years' imprisonment and a $100,000 fine).

This Court has repeatedly held that courts may exercise their power to prosecute criminal contempts only to the extent necessary to protect their authority. *United States* v. *Wilson*, 421 U.S. 309, 319 (1975); *Shillitani* v. *United States*, 384 U.S. 364, 371 n.9 (1966); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). The court of appeals' holding would ironically convert that narrow mandate into the much broader power to control the Executive's exercise of prosecutorial discretion. By serving the "limited purpose" of vindicating its own authority, *Young*, 481 U.S. at 800, the court would disserve the ability of the community as a whole to vindicate its interest in the enforcement of core criminal prohibitions. The Double Jeopardy Clause ought not apply to bar prosecution "where the [government] has made no effort to prosecute the charges seriatim," *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984), and, indeed, where the government has no way of preventing such separate prosecution.

The division of prosecutorial authority between courts and prosecutors mirrors the division between the state and federal governments that underlies the "dual sovereignty" doctrine. Under that doctrine, state and federal authorities may separately prosecute a defendant for similar, or even identical, offenses. See, *e.g.*, *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Heath* v. *Alabama*, 474 U.S. 82 (1985); *Abbate* v. *United States*, 359 U.S. 187, 190-194 (1959); *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 20 (1852); *Fox* v. *Ohio*, 46 U.S. (5 How.) 410, 435 (1847) ("offences falling within the competency of different authorities to restrain or punish them [are]

properly subjected to the consequences which those authorities might ordain and affix to their perpetration"); cf. *Bartkus* v. *Illinois*, 359 U.S. 121 (1959) (due process). The dual sovereignty doctrine is justified in part by concern that, without that doctrine, one sovereign's prosecution for a relatively minor offense could preclude the other from prosecuting a defendant for a grave violation of its law. See *Abbate*, 359 U.S. at 195; *Bartkus*, 359 U.S. at 137.[9] Such control by a State over the ability of other States and the federal government to enforce their own criminal laws would be intolerable in a federal system.

The same rationale is applicable here. To permit a court's exercise of its limited contempt powers to preclude a later prosecution on substantive criminal offenses "would bring about a marked change in the distribution of powers to administer criminal justice." *Abbate*, 359 U.S. at 195. The Double Jeopardy Clause does not bar separate prosecutions by separate sovereigns, because those prosecutions are brought by two distinct prosecuting authorities, neither of which may exercise power over the other. Cf. *In re Chapman*, 166 U.S. 661, 672 (1897). Because an analogous relationship obtains between judicial and executive prosecutorial authority where separate prosecutions are brought for criminal contempt and

[9] The Court noted in *United States* v. *Lanza*, 260 U.S. 377, 385 (1922):

> If a State were to punish the manufacture, transportation, and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.

substantive criminal offenses, the Double Jeopardy Clause is equally inapplicable to separate prosecutions in that setting.

d. Respondents are mistaken in contending (Br. in Opp. 10-11) that changes in the law of contempt have rendered obsolete the rule that criminal contempt may be prosecuted separately from substantive offenses based on the same conduct. Cf. Pet. App. 18a-19a. Although defendants charged with contempt of court are now entitled to most of the procedural protections that are afforded to defendants charged with substantive crimes,[10] the rule permitting separate prosecution for contempt and substantive offenses turns on the nature of the two offenses, not on the procedures that are employed in their prosecution.

Contempt has long been regarded as "a specific criminal offence." *New Orleans* v. *Steamship Co.*, 87 U.S. (20 Wall.) 387, 392 (1874); see also *Gompers* v. *United States*, 233 U.S. 604, 610 (1914); *O'Neal* v. *United States*, 190 U.S. 36, 38 (1903) (an adjudication of contempt is "in effect a judgment in a criminal case"). There is thus no force to the suggestion that at the time of this Court's decisions in *Debs* and *Bessette*, contempt was not regarded as a criminal offense and that the Court therefore did not have to consider whether successive procecutions for contempt and conventional crimes

[10] See, *e.g.*, *Bloom* v. *Illinois*, 391 U.S. 194, 201-202 (1968) (right to jury trial); *Offutt* v. *United States*, 348 U.S. 11 (1954) (right to public trial before unbiased judge); *Cooke* v. *United States*, 267 U.S. 517 (1925) (right to counsel, to call witnesses, to be advised of charges and to respond); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (presumption of innocence, proof beyond reasonable doubt, right not to testify).

would pose double jeopardy problems. Indeed, in *Bessette*, one of this Court's cases stating that a prosecution for contempt does not bar prosecution for a criminal offense committed in the course of the contempt, the Court noted that the proposition that criminal contempt proceedings "are criminal in their nature has been constantly affirmed." 194 U.S. at 336. Developments in the procedures required for contempt trials have therefore not had any effect on the basic proposition that contempt and substantive charges based on the same acts are not the same offense for double jeopardy purposes.

B. *Grady* v. *Corbin* Does Not Require Departure From The Settled Principle That Criminal Contempt And A Substantive Offense Based On The Same Conduct Are Not The Same Offense Under The Double Jeopardy Clause

The court of appeals believed that this Court's decision in *Grady* v. *Corbin* "control[s]" the outcome of this case. Pet. App. 14a. Although the language the Court used in *Grady* is broad enough to address this case, the holding of *Grady* is considerably narrower. As this Court has recently explained, *Grady* and its predecessor, *Illinois* v. *Vitale*, 447 U.S. 410 (1980), stand for the proposition that offenses that are "not technically lesser included offenses" may nonetheless be characterized as "a species of lesser-included offense," *United States* v. *Felix*, 112 S. Ct. 1377, 1384 (1992) (quoting *Vitale*, 447 U.S. at 420), and that successive prosecutions for such offenses are barred under the Double Jeopardy Clause. We submit that *Grady* should be confined to that setting and not applied to crimes such as the ones at issue in this case, which do not bear any resemblance to greater and lesser included offenses.

1. The defendant in *Grady* was driving while legally drunk. His car crossed the median line of a two-way highway and hit another car, killing one of the occupants and injuring the other. The defendant first pleaded guilty to the traffic violations of driving while intoxicated and crossing the median line in connection with an automobile accident. He was subsequently prosecuted on homicide and assault charges arising from the accident. See 495 U.S. at 511-513.

The traffic violations in *Grady* were not technically lesser included offenses of the homicide or assault charges, because the traffic violations required proof that the defendant was operating a motor vehicle, which was not an element of the homicide and assault offenses. Nonetheless, the Court held that the homicide and assault charges were barred to the extent that the government sought to establish elements of homicide and assault by re-proving the traffic violations. 495 U.S. at 522-523. The Court stated as the rule of the case that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 521.[11]

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[11] That formulation addressed the case in which the lesser (or "component") offense is prosecuted first, followed by a separate prosecution for the greater offense. For the converse case in which the greater offense is prosecuted first and the lesser included (or component) offense second, the Court stated that "if in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy Clause would bar subsequent prosecution of the component offense." 495 U.S. at 521 n.11.

By its terms, that formulation is broad enough to cover this case. The court orders in this case directed Foster and Dixon, *inter alia*, to refrain from engaging in criminal conduct—Foster's order directed him not to "assault, or in any manner threaten or physically abuse" his wife, and Dixon's order directed him "to refrain from committing any criminal offense" while on pretrial release. See Pet. App. 4a, 10a. To prove an "essential element" of the contempt offense, the government in each case proved "conduct that constituted an offense" (assault and threats in Foster's case, and a drug violation in Dixon's) that was to be the subject of the substantive criminal prosecution.[12] To apply that formulation here, however, would disregard the rationale underlying both *Grady* and the precedents on which it relied.

In *Grady*, the State sought to "prove the entirety of the conduct for which Corbin [had already been] convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses." 495 U.S. at 523. The Court concluded that under the State's theory of the case, the traffic violations were in effect lesser included offenses of the homicide and assault charges. In the Court's view, it was as improper to permit reprosecution in that setting as it would have been if the legislature had specifically

[12] There is some possible ambiguity in the Court's reference to conduct that the State "necessarily has proved" in the course of securing a conviction of the greater offense. See 495 U.S. at 521 n.11. In light of the formulation used in the text of the opinion, however, it appears that the reference to conduct that the State "necessarily has proved" means that the State must have found it necessary to rely on the conduct constituting the "component" offense in order to prove an element of the greater offense.

provided that in order to prove homicide or assault, the State had to prove that the defendant had been driving while intoxicated or that he had failed to keep to the right of the median.

In its recent decision in *United States* v. *Felix*, 112 S. Ct. 1377 (1992), the Court read *Grady* in the manner we propose here. The Court noted that the formulation of the double jeopardy test set forth by the Court in *Grady*, if "[t]aken out of context, and read literally," would "support[] the defense of double jeopardy." *Id.* at 1383-1384. But the *Felix* Court "decline[d] to read that language so expansively, because of the context in which *Grady* arose and because of difficulties which have already arisen in its interpretation." *Id.* at 1384. Instead, the Court observed that *Grady* was based on decisions barring subsequent prosecution "if one of the two offenses is a lesser included offense of the other." *Ibid.* Although the traffic offenses in *Grady* were not technically lesser included offenses of the homicide and assault charges, the *Felix* Court characterized the decision in *Grady* as following an earlier suggestion that traffic violations of that sort might be viewed "as a 'species of lesser-included offense' " of a subsequent homicide charge. *Ibid.*, quoting *Illinois* v. *Vitale*, 447 U.S. at 420.

The same theme is present in the two cases on which the *Grady* Court principally relied, *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam), and *Illinois* v. *Vitale*, 447 U.S. 410 (1980). In *Harris*, the Court held that a defendant could not be prosecuted for robbery after having been convicted of felony murder based on the same robbery. The offenses at issue in *Harris* were not "the same" under a technical reading of the *Blockburger* "elements" test because, "as a statutory matter, felony murder could be established by proof of any felony, not just

robbery, and robbery with a firearm did not require proof of a death." *Grady*, 495 U.S. at 520. Nonetheless, the Court concluded that the underlying felony was a lesser included offense of the crime of felony murder, because the felony murder statute required the State to prove the commission of an underlying felony as an element of the murder charge. The fact that the State had a single felony murder statute that incorporated all qualifying felonies, rather than a separate felony murder statute for each qualifying felony, was not considered sufficient to change the result. The Court viewed the felony murder charge as simply an aggravated form of the underlying robbery, which is a classic description of a greater and lesser included offense. See also *Whalen* v. *United States*, 445 U.S. 684, 694 (1980) (double jeopardy analysis of felony murder is same as if legislature "had separately proscribed the six different species of felony murder under six statutory provisions").[18]

[18] Although the Court in *Grady* considered *Harris* to be inconsistent with the traditional elements test, we agree with Justice Scalia, dissenting in *Grady* (495 U.S. at 528), that *Harris* can be reconciled with traditional double jeopardy analysis. An aggravated form of a felony is still the "same offense" as the lesser included felony, even when the aggravated felony offense is drafted in a manner that incorporates more than one lesser included offense. Thus, for example, the federal armed bank robbery statute, 18 U.S.C. 2113(d) is an aggravated form of the lesser included offenses of bank robbery and bank larceny, 18 U.S.C. 2113(a) and (b); for double jeopardy purposes, it is the "same offence" as those lesser included offenses, even though it does not set out the elements of each of the lesser offenses, and even though it includes all of the lesser included offenses by generic reference. *Harris* stands for the unremarkable proposition that, for purposes of applying the "elements" test, the aggravated felony offense should be treated as if it specifically included the elements of the particular underlying offense at issue in the case.

In *Vitale*, the State first convicted the defendant of carelessly failing to reduce speed to avoid an accident, and then prosecuted him for involuntary manslaughter based on the two fatalities that resulted from the accident. The Court noted that if a careless failure to slow is not always a necessary element of manslaughter, the two offenses would not technically be the "same" under the elements test. Nonetheless, the Court stated that if the State sought to prove the manslaughter by showing that the defendant carelessly failed to reduce speed, the relationship between the two offenses would be analogous to that of a greater and lesser included offense, and the defendant's "claim of double jeopardy would be substantial." 447 U.S. at 420. As the Court in *Grady* explained its decision, the facts of that case raised the hypothetical situation discussed in *Vitale*, and the Court in *Grady* adopted the suggestion in *Vitale* as its holding. See *Grady*, 495 U.S. at 510, 515-516; see also *Felix*, 112 S. Ct. at 1384.

2. The crimes at issue in this case are not greater and lesser included offenses, and they bear no resemblance to such offenses. Assault with intent to kill and drug distribution are serious felonies that cannot easily be conceived of as lesser included offenses of the crime of contempt of court, which is a petty offense as applied to the conduct in this case. See note 8, *supra*. Although a violation of a court order—one of the elements of contempt of court—was established in part by proof that the defendants committed substantive criminal offenses, that did not render the offense of contempt an aggravated form of assault or drug possession.

A lesser included offense is one that is "necessarily included" in the offense charged, and the rules governing lesser included offenses provide that a defendant may be convicted of the lesser offense if the jury does not convict on the greater. See Fed. R. Crim. P. 31(c); *Schmuck* v. *United States*, 489 U.S. 705, 717-718 (1989). Plainly, the offenses in this case do not fit that model, for in Foster's contempt trial the court could not have convicted Foster of assault with intent to kill, and in Dixon's contempt trial the court could not have convicted Dixon of possession of drugs.[14] That is because neither assault with intent to kill nor drug distribution is, on any reasonable view, a "component offense" of contempt of court, see *Grady*, 495 U.S. at 521 n.11, or "an incident and part of" that offense, see *In re Nielsen*, 131 U.S. 176, 187 (1889).

The traffic violations in *Grady* and *Vitale*, although not technically lesser included offenses of the homicide and assault charges, could nonetheless be considered "components" or "incidents of" those charges much more readily than the substantive offenses in this case could be considered components of the offense of contempt. Even without reference to the particular facts of those cases, the Court viewed the traffic violations as sufficient to prove the "carelessness" element of the greater offenses with which the defendants were charged. See *Vitale*, 447 U.S. at

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[14] For that reason, Foster and Dixon were not in jeopardy during their contempt proceedings with respect to the substantive crimes with which they were later charged. Compare *Green* v. *United States*, 355 U.S. 184 (1957) (double jeopardy bars retrial on greater offense following conviction on lesser included offense that constitutes implied acquittal of greater offense).

420 ("Vitale has already been convicted for conduct that is a necessary element of the more serious crime"); *Grady*, 495 U.S. at 516 (quoting above language: "We believe that this analysis is correct and governs this case.").

Unlike in *Vitale* or *Grady*, the offenses at issue in this case are not even analogous to greater and lesser included offenses. The substantive crimes, as legally defined, establish nothing with respect to the offense of contempt; it is only by referring to the facts of the individual cases—and in particular the contents of the courts' orders—that any relationship between the substantive crimes and the contempt offense becomes evident. The analogy to greater and lesser included offenses that was controlling in *Vitale* and *Grady* is thus inapt in this case.

An example may illustrate what anomalous results the *Grady* test can produce when that test is applied to cases that fall outside the lesser included offense model on which *Grady* is based. Suppose the government sought to try a defendant separately for traveling in interstate commerce to conduct a narcotics business, in violation of the Travel Act, 18 U.S.C. 1952, and for murdering a federal drug agent in the course of that narcotics operation, in violation of 18 U.S.C. 1111. Suppose further that in the Travel Act prosecution the government used the murder to establish the "thereafter act" requirement of the Travel Act (the requirement that, after traveling, the defendant must perform some act in furtherance of the unlawful activity).

Under a broad reading of the *Grady* test, a subsequent prosecution for the murder would appear to be barred, since the government in the Travel Act case would have proved "conduct that constitute[d]"

the offense of murder "to establish an essential element" of the Travel Act. *Grady*, 495 U.S. at 510. That result, however, would be an extraordinary extension of double jeopardy principles, because murder is not in the remotest sense the "same offence" as a Travel Act violation, nor is it in any way a lesser included offense under the Travel Act. The same is true in this case. Just as the double jeopardy analysis of *Grady* would not be extended to the hypothetical case, it should not be applied here.

3. In *Felix*, this Court declined to read *Grady* expansively in a way that would have altered previously well-settled principles of double jeopardy law. The issue in *Felix* was whether *Grady* overturned the "established doctrine" that a conspiracy to commit an offense is not the same as the offense that is the object of the conspiracy. 112 S. Ct. at 1385. The Court concluded that *Grady* had not upset the "long-standing authority" of the rule permitting separate prosecutions for conspiracy and its object offense. 112 S. Ct. at 1385.

The same considerations counsel against an expansive interpretation of *Grady* in this case. The doctrine that contempt is a different offense from the substantive crimes that the contemnor may have committed has long been recognized by this Court and the lower federal and state courts. The traditional *Blockburger* "elements" test reinforces the conclusion that contempt and substantive crimes are not the same offense for double jeopardy purposes. Because the offenses at issue in this case, like those at issue in *Felix*, are not akin to lesser included offenses, the prosecutions in this case should not be barred by the exception to the elements test that the Court devised in *Grady*.

C. If This Court Concludes That *Grady* v. *Corbin* Must Be Read To Bar Successive Prosecution For Criminal Contempt And Substantive Offenses Based On The Same Conduct, This Court Should Reconsider The Reasoning And Result Of That Case

If the Court concludes that *Grady* must be read broadly, in a manner that would require affirmance in this case, we submit that *Grady* should be reconsidered and overruled.

We recognize that this Court does not lightly overrule one of its prior precedents, and we do not lightly suggest that it do so. *Stare decisis* is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2609 (1991); see also *Hilton* v. *South Carolina Public Railways Comm'n*, 112 S. Ct. 560, 564 (1991); *Welch* v. *Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987); *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986). Nevertheless, *stare decisis* has never been understood to be an "inexorable command." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting). "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2609 (1991), quoting *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944). Thus, *stare decisis* is "a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940).

Although this Court has never adopted a "rigid formula" for determining when to overrule a prior decision (*Vasquez*, 474 U.S. at 266), it has identified several factors that bear on that inquiry. It

is well settled that *stare decisis* has less force when constitutional issues, rather than matters of statutory construction, are involved, because "correction through legislative action is practically impossible" in constitutional cases, *Burnet*, 285 U.S. at 407. For that reason, the Court's "considered practice [has been] not to apply *stare decisis* as rigidly in constitutional [cases] as in nonconstitutional cases." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962).[15] In addition, *stare decisis* has less weight when the prior ruling was itself a departure from past precedents [16] and when experience demonstrates that the earlier rule has proved unworkable, has bred confusion, or has led to unforeseen or anomalous results.[17]

The case for overruling *Grady* finds strong parallels in this Court's decisions in *Solorio* v. *United*

[15] See also, *e.g.*, *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272-273 (1980) (plurality opinion); *Monell* v. *Department of Social Services*, 436 U.S. 658, 695 (1978); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). That is particularly true in a case such as this one, which does not involve a constitutional doctrine on which parties have relied in ordering their affairs. Compare *Allied-Signal, Inc.* v. *Director, Division of Taxation*, No. 91-615 (June 15, 1992), slip op. 12; *Quill Corp.* v. *North Dakota*, No. 91-194 (May 26, 1992), slip op. 17; *id.* at 2 (Scalia, J., concurring in part and concurring in the judgment).

[16] *E.g.*, *Collins* v. *Youngblood*, 110 S. Ct. 2715, 2722 (1990); *Thomas* v. *Washington Gas Light Co.*, 448 U.S. at 273 (plurality opinion); *Monell* v. *Department of Social Services*, 436 U.S. at 695-696; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977); *United States* v. *Darby*, 312 U.S. 100, 116-117 (1941).

[17] *E.g.*, *Payne* v. *Tennessee*, 111 S. Ct. at 2611; *California* v. *Acevedo*, 111 S. Ct. 1982, 1991 (1991); *Collins* v. *Youngblood*, 110 S. Ct. at 2722; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. at 47.

States, 483 U.S. 435 (1987), and *Payne* v. *Tennessee*, 111 S. Ct. 2597 (1991). In *Solorio*, the Court overruled its 1969 decision in *O'Callahan* v. *Parker*, 395 U.S. 258, which dealt with the constitutional limits on the jurisdiction of military courts. The Court noted that *O'Callahan* had overturned a long and unbroken line of precedent, was inconsistent with the history of the applicable constitutional provision, and had spawned confusion in the military judicial system. The Court therefore concluded that *O'Callahan* should be reconsidered.

The Court reached the same conclusion in *Payne*, for many of the same reasons. As the Court explained, the prior decisions in *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." 111 S. Ct. at 2611. Moreover, the Court concluded that the decisions in *Booth* and *Gathers* had "defied consistent application by the lower courts." *Ibid.* Being firmly of the view that those cases were wrongly decided, the Court in *Payne* concluded that they should be overruled.

The same analysis applies here. *Grady*, like the overruled precedents in *Solorio* and *Payne*, was decided by the narrowest of margins, over strong dissents challenging its basic rationale. *Grady* has also engendered confusion in the lower courts, and *Grady* was itself a departure from a long and unbroken string of precedent. Most importantly, the decision in *Grady* is simply wrong: it is inconsistent with the language of the Double Jeopardy Clause and the history of that Clause going back to its origins in the common law. Under these circumstances, the case for overruling *Grady* is a compelling one.

1. The language of the Double Jeopardy Clause strongly supports the use of a test that looks to the elements of the offenses at issue, rather than the particular acts that are the subject of the charges, as the basis for determining whether successive prosecutions are permissible. As Justice Scalia noted in his dissent in *Grady*, 495 U.S. at 529, the Clause "protects individuals from being twice put in jeopardy 'for the same *offence*,' not for the same *conduct* or *actions*."

This Court in *Gavieres* v. *United States*, 220 U.S. 338 (1911), drew precisely the distinction that Justice Scalia drew between an "offense," as that term is used in the Double Jeopardy Clause, and the "acts" or "conduct" that may constitute one or more such "offenses." Although the Court in *Grady* did not cite *Gavieres*, the *Grady* "conduct" test for successive prosecutions is flatly inconsistent with the elements test as the Court explained and applied that test in *Gavieres*.

Gavieres was first convicted of behaving in an indecent manner in a public place, and he was subsequently convicted of insulting or threatening public officials.[18] The Court held that, notwithstanding the fact that "the acts and words of the accused set forth in both charges are the same," there was no double jeopardy bar to the second prosecution. 220 U.S. at 342. As the Court observed, "while the transaction charged is the same in each case, the offenses are different." *Ibid.* See also *Burton* v. *United States*, 202 U.S. 344, 380 (1906) (no double jeopardy bar "if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact*"). Of particular note, in light of the Court's adoption of a "same conduct" test in *Grady*, the *Gavieres* Court expressly rejected such a test, stating that "[w]hile it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other." 220 U.S. at 345. We submit that the Court in *Gavieres* was faithful to the language of the Double Jeopardy Clause, and that the Court in *Grady* disregarded that language and thereby fell into error.

2. The historical case against *Grady* is made in Justice Scalia's dissenting opinion in that case. Citing decisions from England and this country both before and after the adoption of the Fifth Amendment, Justice Scalia demonstrated that the elements test has traditionally been the device used to determine whether two offenses are legally distinct and therefore can support successive prosecutions. The majority in *Grady* did not dispute Justice Scalia's historical analysis, except to claim that the elements test has not been the governing test for successive prosecutions since the Court's 1889 decision in *In re Nielsen*, 131 U.S. 176 (1889).

The majority in *Grady* was incorrect in suggesting that the Court has not applied the elements test to successive prosecution claims since *Nielsen*. In fact, the Court has routinely applied the elements test in its successive prosecution cases, including *Nielsen* itself. See *Payne* v. *Virginia*, 468 U.S. 1062 (1984) (per curiam); *Harris* v. *Oklahoma*, 433 U.S.

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[18] *Gavieres* was a Philippines prosecution that arose while the Philippines were under United States jurisdiction. While the case was not governed directly by the Double Jeopardy Clause, it was governed by an Act of Congress that had been construed to provide an equivalent protection in Philippines prosecutions. See 220 U.S. at 341; *Kepner* v. *United States*, 195 U.S. 100 (1904). Accordingly, the Court's analysis in *Gavieres* is based on constitutional double jeopardy principles.

682 (1977) (per curiam); *Brown* v. *Ohio*, 432 U.S. 161, 166-167 (1977); *United States* v. *Bayer*, 331 U.S. 532, 542-543 (1947); *Gavieres* v. *United States*, 220 U.S. 338, 342-344 (1911); *Grafton* v. *United States*, 206 U.S. 333, 349-351 (1907); *Burton* v. *United States*, 202 U.S. 344, 380-381 (1906). Only in *Grady* has the Court held that two statutes that are distinct under the elements test will nonetheless not support successive prosecutions.[19]

Contrary to the statement in *Grady*, the Court's decision in *Nielsen* is consistent with the use of the elements test to determine whether successive prosecutions are permitted for a violation of different statutes. The defendant in *Nielsen* was first charged with cohabitation, based on the allegation that he had lived as man and wife with two women continuously for several years. After the defendant pleaded guilty to the cohabitation charge, the government sought to prosecute him for committing adultery with one of the two women. 131 U.S. at 177. The Court held the second prosecution barred by the Double Jeopardy Clause.

The Court in *Nielsen* treated the question before it as whether the offense of adultery was entirely encompassed within the offense of cohabitation, as defined in an 1882 federal statute directed at prohibiting polygamy. As the governing test, the Court adopted the formulation set forth in *Morey* v. *Commonwealth*, 108 Mass. 433, 435 (1871), which is exactly the same formulation that the Court later

[19] In *Garrett* v. *United States*, 471 U.S. 773, 789 (1985), the Court suggested that for compound offenses involving "multilayered conduct, both as to time and to place," successive prosecutions might be permitted even if the two statutes in question did not have distinctive elements.

adopted in *Blockburger*: "A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Nielsen*, 131 U.S. at 188, quoting *Morey*, 108 Mass. at 434. The Court then analyzed the crimes of adultery and cohabitation and concluded that the offense of adultery was a lesser included offense of the offense of cohabitation as defined in the 1882 statute. Although the Court's analysis in reaching that conclusion is somewhat obscure and may be questionable as a matter of statutory construction, the Court's constitutional analysis was clear: the Court held that the elements test was the proper means to determine whether two statutory crimes constituted the same offense and therefore could not be the subject of successive prosecutions.[20]

The *Nielsen* case demonstrates that the Court did not abandon the elements test in 1889, as the Court suggested in *Grady*. To the contrary, *Nielsen* makes clear that the Court regarded the elements test, as

[20] To reach the conclusion, under the elements test, that adultery was a lesser included offense of cohabitation, the Court had to find that two of the elements of adultery, (1) that the parties committed intercourse, and (2) that one of them was married to someone else, were necessary elements of cohabitation. The Court did so by noting that the 1882 cohabitation statute was aimed at polygamy and therefore required that the cohabiting parties "live together as husband and wives." 131 U.S. at 189. In the Court's view, that phrase necessarily implied intercourse, *id.* at 187, and it also required the government to prove that the cohabiting parties lived in a state of marriage, *id.* at 189. The Court therefore concluded that each element of adultery was also an element of the crime of cohabitation.

developed by the common law courts, to be the proper test for determining whether two crimes constitute the same offense for double jeopardy purposes. The Court reviewed the early American cases and the contemporaneous commentators, all of which agreed that the test for determining what constitutes the "same offense" for purposes of the lawfulness of successive prosecutions turns on the elements of the offenses charged, not the identity of the conduct that is the subject of the two prosecutions. 131 U.S. at 187-190. As the *Nielsen* Court put it, "[t]he test is not, whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence." 131 U.S. at 188.

3. Finally, the complex formulation in *Grady*, which focuses on the particular conduct that is the subject of prosecution, has proved to be unworkable. The standard set forth in that case, which bars any subsequent prosecution in which the government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted," 495 U.S. at 521, is a linguistic minefield. It introduced a number of terms—such as "to establish an essential element" and "conduct that constitutes an offense"—that have never before been used in double jeopardy analysis and that have no well-defined legal meaning. Moreover, the formulation is ambiguous on some critical points. For example, it is unclear whether the proof of conduct "to establish" an element of a second offense means that the proof must actually establish the element in question, or only be offered in an effort to establish that element. Likewise, it is unclear whether the reference to "conduct that constitutes" the first offense

means that the government must find it necessary to prove all the elements of the first offense in the second prosecution.

The Court in *Felix* acknowledged that the *Grady* test has given rise to "difficulties * * * in its interpretation," 112 S. Ct. at 1384, and that "the line between the [same evidence and same transaction] tests and the 'same conduct' language of *Grady* is not easy to discern". As a result, lower federal and state courts have found *Grady* difficult to apply.[21] Indeed, in *Felix* itself, which represented the first occasion that this Court has had to apply *Grady*, the test articulated in *Grady* came into apparent conflict with a well-settled doctrine of double jeopardy law—the principle that a conspiracy and its objects are separate offenses—and the Court declined to apply the *Grady* formulation. The instant case signals that clashes between the *Grady* formulation and otherwise settled double jeopardy principles is likely to continue as long as the *Grady* standard is left undisturbed.

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[21] See, *e.g.*, *Ladner* v. *Smith*, 941 F.2d 356, 364 (5th Cir. 1991) (*Grady*'s "lesson, even if carefully analyzed and painstakingly administered, is not easy to apply"), cert. denied, 112 S. Ct. 1665 (1992); *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), vacated, 112 S. Ct. 1657 (1992) (three court of appeals judges interpret *Grady* in three different ways); *State* v. *Kipi*, 811 P.2d 815, 821 (Haw.), cert. denied, 112 S. Ct. 194 (1991) (concluding that *Grady* in effect requires prosecutors to join all related offenses in a single prosecution); *State* v. *Woodfork*, 478 N.W.2d 248 (Neb. 1991), overruling *State* v. *Harrington*, 461 N.W.2d 752 (Neb. 1990) (state court reaches contrary conclusions about the effect of *Grady* in two post-*Grady* decisions); *Eatherton* v. *State*, 810 P.2d 93 (Wyo. 1991) (majority concludes that *Grady* does not change double jeopardy law; dissent concludes that *Grady* dramatically changes double jeopardy law).

4. If *Grady* is overruled, what should take its place? We submit that in most settings the *Blockburger* elements test is the appropriate guide to what constitutes the same offense. As Justice Scalia's analysis in *Grady* makes clear, that was the test used to determine when common law offenses were "the same," and it has long been the test used by both state and federal courts to make the same determination for statutory offenses. Thus, at least for ordinary criminal offenses, the elements test not only reflects a commonsense notion of when two statutory offenses are distinct, but it also accurately captures the original sense of the term "same offence" as used in the Double Jeopardy Clause.

That is not to say, however, that strict adherence to the *Blockburger* elements test is invariably appropriate. As we have noted, the elements test, if applied with undue strictness, can sometimes be underinclusive in identifying prosecutions that are for "the same offense" within the meaning of the Double Jeopardy Clause, as was the case in *Harris* v. *Oklahoma*, *supra*. By the same token, the *Blockburger* test can sometimes be overinclusive. While the elements test is appropriate for most cases involving a single course of conduct, it does not necessarily suffice for cases involving crimes that require proof of the commission of multiple predicate offenses over a period of time. For example, the prosecution must prove all the elements of a drug offense when it seeks to use that offense as one of the series of violations necessary to prove a continuing criminal enterprise (CCE) charge. Nonetheless, this Court has expressed "serious doubts" whether a drug offense that serves as a predicate offense for a continuing criminal enterprise (CCE) charge is a " 'lesser included offense' within the CCE charge so that the prosecution of the former

would bar a prosecution of the latter." *Garrett* v. *United States*, 471 U.S. 773, 790 (1985). See also *United States* v. *Felix*, 112 S. Ct. at 1385 ("Reliance on the lesser included offense analysis * * * falls short in examining CCE offenses that are based on previously prosecuted predicate acts."); *United States* v. *Evans*, 951 F.2d 729 (6th Cir. 1991), cert. denied, 112 S. Ct. 1966 (1992).

The same principle applies to offenses that serve as predicate acts of racketeering in a RICO prosecution, see 18 U.S.C. 1962(c). The predicate acts are not considered lesser included offenses (even though they may technically fail to satisfy the *Blockburger* test), and successive prosecutions for RICO and its predicate offenses are therefore permitted. See, *e.g.*, *United States* v. *O'Connor*, 953 F.2d 338 (7th Cir.), cert. denied, 112 S. Ct. 1979 (1992); *United States* v. *Arnoldt*, 947 F.2d 1120, 1125-1127 (4th Cir. 1991), cert. denied, 112 S. Ct. 1666 (1992); *United States* v. *Gonzalez*, 921 F.2d 1530, 1535-1539 (11th Cir.), cert. denied, 112 S. Ct. 178 (1991); *United States* v. *Gambino*, 920 F.2d 1108, 1112-1113 (2d Cir. 1990), cert. denied, 112 S. Ct. 54 (1991); *United States* v. *Pungitore*, 910 F.2d 1084, 1107 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991); *United States* v. *Brooklier*, 637 F.2d 620, 621-624 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981).[22]

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[22] A hypothetical "career offender" statute provides another example of a statute that would not satisfy the *Blockburger* test but would clearly support successive prosecutions. Most recidivist statutes impose additional penalties on persons who are shown to have several prior convictions. It is well settled that prosecution under those statutes does not violate the Double Jeopardy Clause. See *Spencer* v. *Texas*, 385 U.S. 554, 559-560 (1967); *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948). While recidivist statutes typically require the State only to prove that the defendant has committed a new offense after

Because complex offenses such as CCE and RICO were unknown at common law, it is not surprising that the traditional elements test, which has its origins in the common law of crimes, does not necessarily resolve the question whether those offenses are separate from their individual predicate crimes for double jeopardy purposes. As the Court has noted in *Garrett* and *Felix*, the " 'lesser included offense' principles of double jeopardy" cannot readily be transposed "from the classically simple situation" presented in cases such as *Brown* v. *Ohio* to compound offenses such as CCE and RICO. *Felix*, 112 S. Ct. at 1385; *Garrett*, 471 U.S. at 789.

Where the offenses in question are novel statutory offenses having no common law analogues, the courts must look to the intent of the legislature to determine whether the new offenses were intended to be distinct offenses—and thus separately prosecutable—or merely enhanced forms of pre-existing crimes. The legislative will is regarded as dispositive in closely analogous settings, such as determining whether two statutes permit cumulative punishment,[23] and determin-

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previously having been convicted of other offenses, we submit that such a statute would not be impermissible under the Double Jeopardy Clause if, in order to ensure the reliability of the prior convictions, the statute required the State to re-prove the prior offenses beyond a reasonable doubt. Even though the State would be required to re-prove all the elements of the prior offenses in the prosecution under the recidivist statute, the prior offenses would not be "lesser included offenses" of the recidivist statute in any conventional sense, and the recidivist violation would therefore not be the "same offence" as the prior offenses.

[23] See, *e.g.*, *Ohio* v. *Johnson*, 467 U.S. 493 (1984); *Missouri* v. *Hunter*, 459 U.S. 359 (1983); *Albernaz* v. *United States*, 450 U.S. 333 (1981).

ing "[w]hether a particular course of conduct involves one or more distinct 'offenses' " under a single statute, *Sanabria* v. *United States*, 437 U.S. 54, 70 (1978).[24] Thus, where the legislature has attempted to create distinct offenses and is acting outside the context of traditional offenses analogous to those found at common law, it is appropriate to look to legislative purpose to determine whether two separate statutes create different offenses and would therefore support successive prosecutions under the Double Jeopardy Clause.[25] Subject to that qualification, however, we believe that the elements test is the appropriate starting point—and normally the appropriate ending point as well—for determining whether successive prosecutions under different statutory provisions are permissible. In this case, the elements test establishes that the substantive offenses with which both Dixon and Foster have been charged are different from the crime of contempt for which they were previously prosecuted. The Double Jeopardy Clause

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[24] See, *e.g.*, *Ladner* v. *United States*, 358 U.S. 169, 173 (1958) (Congress may define whether wounding two federal officers with a single shotgun blast constitutes one or two violations of a statute prohibiting assaulting a federal officer); *Bell* v. *United States*, 349 U.S. 81, 82-83 (1955) (Congress may define whether transporting a number of women across a state line for purposes of prostitution constitutes one or several Mann Act violations); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952) (Congress may define whether a single act resulting in payment of subminimum wage to many employees constitutes one or many violations of the Fair Labor Standards Act).

[25] In the case of both RICO and CCE, it is clear that Congress intended to create a new offense altogether, not simply an aggravated form of one or more of the predicate crimes. See *Garrett* v. *United States*, 471 U.S. at 784-785; *Russello* v. *United States*, 464 U.S. 16, 26-28 (1983).

therefore does not bar their prosecution for the assault and drug crimes with which they have been charged.

CONCLUSION

The judgments of the District of Columbia Court of Appeals should be reversed.

Respectfully submitted.

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JUNE 1992

APPENDIX

1. D.C. Code Ann. § 16-1002(c) (1981) provides, in pertinent part:

> The institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this chapter.

2. D.C. Code Ann. § 16-1004(a) (1981) provides, in pertinent part:

> Upon a filing of a petition for civil protection by the Corporation Counsel or by a complainant, the Family Division shall set the matter for hearing, consolidating it, where appropriate, with other matters before the Family Division involving members of the same family.

3. D.C. Code Ann. § 16-1005(c) (1981) provides, in pertinent part:

> If, after hearing, the Family Division finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order—
>
> (1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family member;
>
> * * * * *
>
> (3) directing, where appropriate, that the respondent avoid the presence of the family member endangered;
>
> * * * * *
>
> (f) Violation of any temporary or permanent order issued under this chapter and failure to

appear as provided in subsection (a) shall be punishable as contempt.

4. D.C. Code Ann. § 22-501 (1981) provides:

> Every person convicted of any assault with intent to kill * * * shall be sentenced to imprisonment for not less than 2 years or more than 15 years.

5. D.C. Code Ann. § 22-504 (1981) provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than $500 or be imprisoned not more than 12 months, or both.

6. D.C. Code Ann. § 22-2307 (1981) provides:

> Whoever threatens within the District of Columbia to * * * injure the person of another * * * shall be fined not more than $5,000 or imprisoned not more than 20 years, or both.

7. D.C. Code Ann. § 23-1329 (1981) provides, in pertinent part:

> (a) A person who has been conditionally released pursuant to section 23-1321 and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.
>
> * * * * *
>
> (c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both.

8. D.C. Code Ann. § 33-541 provides, in pertinent part:

> (a)(1) Except as authorized by this chapter, it is unlawful for any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance.
>
> (2) Any person who violates this subsection with respect to:
>
> > (A) A controlled substance classified in Schedule I or II which is a narcotic drug, phencyclidine, or a phencyclidine immediate precursor, is guilty of a crime and upon conviction may be imprisoned for not more than 15 years, or fined not more than $100,000, or both.

9. D.C. Superior Court Rules Governing Intrafamily Proceedings provide, in pertinent part:

> Rule 7. Motions.
>
> (c) *Motion for contempt for violation of protection order.* When a motion for contempt is filed alleging violation of a civil protection order or temporary protection order, the Intrafamily Clerk shall issue a notice of hearing and order directing appearance. * * * Punishment upon a finding of contempt shall be limited as provided in [Superior Court Rules] Intrafamily 12(e).
>
> Rule 12. Contempt.
>
> (b) *Violation of protection order.* A motion alleging one or more violations of a temporary

protection order or civil protection order shall be filed and served pursuant to Rule 7(c).

* * * * *

(e) *Punishment upon finding of contempt by the Division.* Contempt may be punished by a fine or penalty of not more than $300.00 or by imprisonment for not more that six (6) months, or both.

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(6)

No. 91-1231

Supreme Court, U.S.
FILED
AUG 3 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

ALVIN J. DIXON,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL FOSTER,

Respondent.

On Writ Of Certiorari
To The District Of Columbia Court Of Appeals

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QUESTION PRESENTED

Whether the prosecution of respondents for criminal contempt, based on violations of the criminal code, followed by prosecution for the same criminal code offenses violates the Double Jeopardy Clause.

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State v. Thompson, 659 P.2d 383 (Or. 1983) 23

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United States v. Evans, 951 F.2d 729 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1966 (1992)..... 47

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United States v. Ferrugia, 604 F. Supp. 668 (E.D.N.Y. 1985).....23, 24

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United States v. Gambino, 920 F.2d 1108 (2d Cir. 1990), *vacated*, 112 S.Ct. 1657 (1992) 45

United States v. Haggerty, 528 F. Supp. 1286 (D. Colo. 1981) 22

United States v. Halper, 490 U.S. 435 (1989) 32

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Brief for the United States as *Amicus Curiae*, *Young v. United States ex rel. Vuitton et Fils S.A.* (No. 85-1329) 15, 16

Federal Judicial Center, *Modern Federal Jury Instructions, Pattern Criminal Jury Instructions* (1991) 47

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R. Goldfarb, *The Contempt Power* (1963) 35

Mayers & Yarbrough, *Bis Vexari*: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1 (1960) 41

National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice* (1990) 27, 29

D. Robinson, Congressional Research Service, *Family Violence: Background, Issues, and the State and Federal Response* 25 (1992) 29

Supplemental Brief In Opposition To Petition For Writ Of Certiorari, *Colombo v. New York* (No. 71-352) 21

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No. 91-1231

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

ALVIN J. DIXON,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL FOSTER,

Respondent.

On Writ Of Certiorari
To The District Of Columbia Court Of Appeals

BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The pertinent District of Columbia statutes and rules are reprinted in an appendix to this brief.

STATEMENT

The two respondents in this case were prosecuted for criminal contempt in the Superior Court of the District of Columbia. At each trial, the prosecutor attempted to prove the respondent violated a court order that required him to refrain from committing acts prohibited by the District of Columbia criminal code. The judgments of conviction sentenced each respondent to prison. This case is before the Court, because the government seeks to prosecute the respondents again, this time on indictments charging the same crimes, based on the identical acts, the prosecutor was required to prove in the contempt proceedings. The court of appeals dismissed the indictments, concluding that further prosecution puts respondents in jeopardy twice for the same offense, in violation of the Double Jeopardy Clause. Pet. App. 1a-20a.

1. *Dixon*. On March 9, 1987, Dixon was charged with second degree murder. A hearing commissioner released him, pursuant to D.C. Code Ann. § 23-1321(a) (1989 Repl.), on a surety bond subject to certain conditions, including the requirement that Dixon "[r]efrain from committing any criminal offense. . . ." Pet. App. 26a; J.A. 8. On February 23, 1988, the United States Attorney filed a Motion To Modify Bond, representing that Dixon had been indicted for possessing cocaine with the intent to distribute it on January 15, 1988. J.A. 10; *see* D.C. Code Ann. § 33-541(a)(1) (1988 Repl.). The Superior Court issued an order, noting that Dixon's indictment (J.A. 9) reflected an apparent violation of the pretrial release condition, and requiring Dixon to show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified. J.A. 12-13.

At the show cause hearing, the Assistant United States Attorney reminded the court "that we are here on the Government's motion filed on February 23, 1988." *Dixon* Supp. R. No. 2 (hereafter "*Dixon* S.R.") at 2. That motion had not mentioned contempt, *see* J.A. 12-13, and the judge did not suggest he intended to pursue a contempt charge. *Dixon* S.R. at 2. As the testimony began, it was clear the court assumed it was conducting a motion to modify bond. After the prosecutor asked his first witness a few questions, the judge wondered if the government had "sufficient evidence to grant the relief that's being requested." *Dixon* S.R. at 8. He explained that proving Dixon committed a new offense did not demonstrate "a risk of flight that would justify my raising the bond. . . ." Because the government was not "asking for preventive detention," under D.C. Code Ann. § 23-1329 (1989 Repl.), the court concluded it could grant the government relief only by holding Dixon "in contempt." The judge asked the prosecutor if he could "establish that [Dixon] committed a new offense beyond a reasonable doubt. . . ." *Dixon* S.R. at 8-9.

The prosecutor believed himself prepared, *Dixon* S.R. at 9, but he apparently did not understand that going forward meant conducting a criminal trial. During the second day of trial, the prosecutor urged the court to overlook a gap in the government's evidence demonstrating the chain of custody of the drugs seized from Dixon, because "for a contempt citation, it's not beyond a reasonable doubt. The standard is less than beyond a reasonable doubt, as we understand it." *Dixon* S.R. at 23. The court allowed the government a continuance to supplement its proof, *Dixon* S.R. at 27, after agreeing with

defense counsel "that this is a criminal trial and that the standard of proof is guilt beyond a reasonable doubt." *Dixon* S.R. at 24. On the third day of trial, four police officers testified for the government. The defense cross-examined all witnesses and introduced evidence. J.A. 10a.

The court's finding showed that the gist of the contempt prosecution was proof of the criminal code offense: "I think it merely is a technicality that [I] take judicial notice of [the release order]. I think the Government's burden is to show that there was in fact a crime committed by the defendant while he was on pretrial release." J.A. 14. The court found "the Government has established, beyond a reasonable doubt, that the defendant was in possession of drugs and that those drugs were possessed with the intent to distribute them." J.A. 14. Dixon was sentenced to 180 days in prison, pursuant to D.C. Code Ann. § 23-1329(c) (1989 Repl.). J.A. 16.

On May 17, 1988, Dixon filed a motion to dismiss the indictment charging possession with intent to distribute cocaine on January 15, 1988. Pet. App. 28a. The Superior Court held that the Double Jeopardy Clause requires dismissal of the indictment. Pet. App. 32a. The government then appealed the dismissal order. Pet. App. 4a.

2. *Foster*. On July 29, 1987, Foster's wife, Ana, filed a petition in the Superior Court for a civil protection order (CPO) directed to her husband. Pet. App. 22a. *See* D.C. Code Ann. § 16-1003(a) (1989 Repl.). Foster consented on August 12, 1987, to entry of a CPO, under D.C. Code Ann. § 16-1005(c) (1989 Repl.), directing him not to "molest, assault, or in any manner threaten or physically abuse" his wife for 12 months. Pet. App. 4a; J.A. 18. In

September and November, 1987, and May, 1988, Ana Foster filed motions to adjudicate Foster in contempt, *see* D.C. Code Ann. § 16-1005(f) (1989 Repl.); D.C. Super. Ct. Intrafamily R. 7(c), for sixteen alleged violations of the CPO. Pet. App. 4a-5a; J.A. 18-29. The last motion included an allegation that Foster assaulted his wife on May 21, 1988. Pet. App. 5a. The United States Attorney filed a complaint on July 21, 1988, charging Foster with assault with intent to kill while armed based on this incident. Pet. App. 7a. Foster was arrested and then detained, July 21, 1988, on a $20,000 surety bond. J.A. 1; *Foster* Supp. R. No. 1 (hereafter "*Foster* S.R.") at 405.

Foster's contempt trial began August 8, 1988. Mrs. Foster's attorney appeared to prosecute. *Foster* S.R. at 3. The Superior Court judge (not the judge who issued the CPO) sought assurance that the lawyers had considered a "settlement" – a matter that did not "make a bit of difference" to the judge. *Foster* S.R. at 6. Moments later, the judge questioned whether Mrs. Foster's attorney was asking him "[t]o just try something for exercise [which] isn't the best way to use the Court's time." *Foster* S.R. at 8. He believed that if Foster had done something as serious as Ana Foster's attorney was suggesting, "the U.S. Attorney's office would be doing something about it." *Foster* S.R. at 8. Foster's attorney then told the judge that the matter was before the grand jury. J.A. 30. Mrs. Foster's attorney added that she had spoken with the United States Attorney's office. She explained, "[S]ome of the witnesses we had subpoenaed will probably not be called for that reason [the grand jury investigation], because the U.S. Attorney has asked us not to call the

officers unless we really need them." J.A. 30. This statement was consistent with petitioner's representation to the Court of Appeals that "the government [does not] seek any role in the contempt proceeding as it is a civil matter," and that generally contempt proceedings for CPO violations should not "be stayed pending criminal charges." United States C.A. Br. 20 nn. 31 & 32. During a three-day bench trial, Mrs. Foster's attorney called eight witnesses including a police officer and introduced various exhibits. Foster testified and denied the charges. Pet. App. 5a-6a.

The court held that to prove Foster committed assaults and threats in violation of the CPO, Mrs. Foster's attorney had "to prove as an element, first that there was a Civil Protection Order, and then . . . the assault [or threat] as defined by the criminal code, in fact occurred." *Foster* S.R. at 367. The court found "beyond a reasonable doubt" that Foster assaulted his wife on November 6, 1987 and May 21, 1988, and threatened her on September 17, 1988. J.A. 39. Foster was acquitted of all other counts, including alleged threats to his wife on November 12, 1987, March 26, 1988, and May 17, 1988. Pet. App. 6a-7a. The court sentenced Foster to an aggregate sentence of 600 days imprisonment – consecutive terms of 150 days imprisonment on each of the three counts, J.A. 42, and on one count related to violation of a CPO obtained by Foster's mother-in-law. Pet. App. 2a.

On January 9, 1989, the grand jury indicted Foster on five counts. Pet. App. 7a; J.A. 43-44. Each count charged the assaultive or threatening conduct for which Foster had either been convicted or acquitted during his first trial. Count 1 alleged an assault on November 6, 1987

(previously convicted), in violation of D.C. Code Ann. § 22-504 (1989 Repl.). Count 2 alleged a threat on November 12, 1987 (previously acquitted). Count 3 alleged a threat on March 26, 1988 (previously acquitted). Count 4 alleged a threat on May 17, 1988 (previously acquitted). Counts 2, 3 and 4 alleged violations of D.C. Code Ann. § 22-2307 (1989 Repl.). Count 5 alleged an assault with intent to kill Ana Foster on May 21, 1988 (previously convicted), in violation of D.C. Code Ann. § 22-501 (1989 Repl.).

Foster moved to dismiss the entire indictment on the grounds that it put him twice in jeopardy for the same offense. He moved to dismiss the threat counts on the additional grounds that his prior acquittals collaterally estopped further prosecution. The Superior Court denied his motion, without addressing his collateral estoppel claim. Pet. App. 8a-9a. Foster took an interlocutory appeal of the denial of his motion to dismiss. Pet. App. 3a.

3. After briefing and argument before separate panels, the District of Columbia Court of Appeals consolidated the cases for reargument *en banc*. The full court unanimously held, on the basis of *Grady v. Corbin*, 495 U.S. 508 (1990), that the Double Jeopardy Clause barred successive prosecution of both Dixon and Foster. Pet. App. 2a-20a. The court found it "obvious," even "undisputed," that both prosecutions concerned "the very same conduct." Pet. App. 15a-16a. The court also found the fact that Mrs. Foster's attorney conducted Foster's contempt trial "irrelevant to the double jeopardy issue," because the prosecutor's identity does not affect "the impact of a contempt prosecution" on the defendant. Pet. App. 19a.

SUMMARY OF ARGUMENT

A. The fundamental principle that has animated this Court's contempt jurisprudence over the last century is the rule of necessity. Encroachments on fundamental protections afforded other criminal defendants in the name of the special interest served by contempt, vindication of the court's authority, have been allowed only to the extent that the encroachment is genuinely *necessary* to the vindication of that interest. Petitioner's argument that the double jeopardy guarantee should not apply to successive prosecutions for criminal contempt and a criminal code offense ignores that fundamental principle of necessity, as well as the radical changes wrought by increasingly strict application of that principle, from *In re Debs*, 158 U.S. 564 (1895), to *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

The rationale of *Bloom v. Illinois*, 391 U.S. 194 (1968), rejecting the "necessity" perceived in *In re Debs* for denying a jury trial in a serious contempt prosecution, compels the same result here. The protection against being placed twice in jeopardy for the same offense is a fundamental protection of the Bill of Rights. Petitioner has not and cannot advance any necessity for denying the protections of the Double Jeopardy Clause to successive prosecutions for criminal contempt and a criminal code offense.

Contrary to petitioner's suggestion, this Court has never held that successive prosecutions for contempt and a criminal code offense are not barred by the Double Jeopardy Clause. Indeed, the only two decisions of this Court on the issue suggest strongly that double jeopardy

principles apply fully in this context. The only two recent federal court decisions agree. The cases cited by petitioner turn either on double jeopardy issues that have nothing to do with contempt or are based on claims of necessity that have been rejected by this Court.

B. Once it is clear that normal double jeopardy principles apply here, there can be little doubt that respondents were prosecuted twice for the same offense. The offenses charged at the contempt trials were defined as the criminal code offenses plus knowledge of a court order not to commit the criminal code offense. The criminal code offenses thus were every bit as much a "component offense" and a "species of lesser included offense" of the contempt offense as were the offenses in *Harris v. Oklahoma*, 433 U.S. 682 (1977), and *Illinois v. Vitale*, 447 U.S. 410 (1980).

This Court should reject petitioner's invitation to overrule *Grady v. Corbin*, 495 U.S. 508 (1990). *Grady* relies on solid precedent in concluding that in successive prosecutions, the Double Jeopardy Clause requires more than adherence to legislative intent and thus more than the test for legislative intent set out in *Blockburger v. United States*, 284 U.S. 299 (1932). The test articulated in *Grady* for determining whether two offenses are the same in successive prosecutions is a useful test, particularly in this context which, like *Grady*, involves a single course of conduct, limited both as to time and place. Even if this Court were troubled by the potential application of *Grady*'s test in more complicated factual situations, this case is not an appropriate one to address those concerns. Under any test but the most formalistic application of

Blockburger, it is clear that respondents were prosecuted twice for the same offense.

ARGUMENT

PROSECUTION OF RESPONDENTS FOR CRIMINAL CONTEMPT, BASED ON VIOLATIONS OF THE CRIMINAL CODE, FOLLOWED BY PROSECUTION FOR THE SAME CRIMINAL CODE OFFENSES VIOLATES THE DOUBLE JEOPARDY CLAUSE

A. The Constitution Requires Application Of Normal Double Jeopardy Principles To Successive Prosecutions For Criminal Contempt And Criminal Code Offenses

1. The history of this Court's decisions on the power to punish for contempt of court shows an increasing intolerance towards encroachments on constitutional rights in the name of vindicating judicial authority. In 19th Century contempt jurisprudence, there were few limits on the ability of courts to punish summarily without the protections constitutionally guaranteed in criminal prosecutions. This Court repeatedly held, for instance, that federal and state courts could punish any criminal contempt without a jury trial. *E.g.*, *Eilenbecker v. District Court of Plymouth County*, 134 U.S. 31, 36-39 (1890); *In re Debs*, 158 U.S. 564, 594-596 (1895). *See Bloom v. Illinois*, 391 U.S. 194, 195-196 (1968) (discussing history of contempt). As the Court in *Bloom* recognized, "it seems to have been thought that summary power was necessary to preserve the dignity, independence, and the effectiveness of the judicial process – 'To submit the question of disobedience to another tribunal, be it a jury or an other

court, would operate to deprive the proceeding of half its efficiency.'" *Id.* at 208 (quoting *Debs*, 158 U.S. at 595).

Within a few years of its decision in *Debs*, however, the Court became more "sensitive to the potential for abuse which resides in the summary power to punish for contempt." *Id.* at 204. Before the end of the century, the Court began to draw a careful distinction "between contempts occurring within the view of the court, for which a hearing and formal presentation of evidence were dispensed with, and all other contempts where more normal adversary procedures were required." *Ibid* (citing *Ex parte Terry*, 128 U.S. 289 (1888) and *In re Savin*, 131 U.S. 267 (1889)). The distinction was based on a principle of "necessity": "the danger that unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the 'very hallowed place of justice,' . . . is not instantly suppressed and punished, demoralization of the court's authority will follow." *Cooke v. United States*, 267 U.S. 517, 536 (1925). *See Ex parte Terry*, 128 U.S. at 313 (summary punishment of in-court contempt "absolutely essential"); *Offut v. United States*, 348 U.S. 11, 14 (1954) ("necessities" justify summary power).

During the 20th Century, the Court has approached claims of "necessity" with increasing skepticism and has expanded the protections applicable in contempt cases. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (defendants in contempt proceedings involving out-of-court behavior must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves); *Cooke*, 267 U.S. at 537 (alleged contemnors must be advised of

charges, given a reasonable opportunity to meet them, and allowed the assistance of counsel and the right to call witnesses); *In re Oliver*, 333 U.S. 257, 278 (1948) ("right to be heard in open court . . . too valuable to be whittled away under the guise of 'demoralization of the court's authority' "); *Offut*, 348 U.S. at 18 (right to trial before unbiased judge). Thus, by the time *Bloom* was decided, the Court concluded that, for purposes of applying constitutional safeguards in criminal prosecutions, non-summary criminal contempt generally must be regarded as a "crime in the ordinary sense. . . . " 391 U.S. at 201.

The Court's decision in *Bloom* to overrule *Debs* resolved a long struggle over the extent to which the vindication of judicial authority can justify the denial of the constitutional right to a jury. Fifty years earlier, Justice Holmes, who favored "the sharpest and most summary enforcement of order in court and obedience to decrees," had not persuaded the Court that "when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 425-426 (1918) (dissenting opinion), *overruled by Nye v. United States*, 313 U.S. 33, 52 (1941). *See United States v. Barnett*, 376 U.S. 681, 755 n.40 (1964) (Goldberg, J., dissenting) (quoting Justice Holmes' dissent). *Cf. Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 442 ("disobedience is a thing accomplished"). Only ten years before *Bloom*, Justice Black decried how the Court still allowed the "boundless expedients of a judicial decree" to "easily evade[]" the "great procedural safeguards erected by the Bill of Rights," without any

showing of "compelling necessity." *Green v. United States*, 356 U.S. 165, 194, 216 (1958) (dissenting opinion).

This Court has vindicated the insights of these dissents. *Bloom* held that "in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes." 391 U.S. at 202. In reaching this conclusion the Court rejected the expansive concept of necessity *Debs* used to forestall the explicit terms of the Constitution. "Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution. We see no sound reason in logic or policy not to apply it in the area of criminal contempt." *Id.* at 209.

The logic that compelled the result in *Bloom* is fully applicable here. Except in summary contempts, where this Court has recognized a need for immediate, untrammeled action, there is no necessity, and therefore no justification, for denying a defendant the protections of the Double Jeopardy Clause, which, like the right to a jury, "represents a fundamental ideal in our constitutional heritage." *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

2. Petitioner never acknowledges the reasoning that has driven this transformation in the law of criminal contempt. Yet, petitioner urges the Court to jettison normal double jeopardy principles for determining if two prosecutions involve the "same offense," merely because one prosecution is a criminal contempt proceeding and

the other a prosecution under the criminal code. Petitioner has failed to show a compelling need for this encroachment upon the Constitution.

The different interests underlying criminal contempt proceedings and other criminal prosecutions, *see Young*, 481 U.S. at 800, do not create a necessity for separate proceedings.[1] If this case concerned a single proceeding, these different interests might indicate a legislative intent to allow cumulative punishments for contempt and a criminal code offense. As indicia of legislative intent, these separate interests would be important, because in the context of a single proceeding, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

This case, however, is about the need for separate *prosecutions*. Obviously a legislature may permit several social interests to be vindicated in a single proceeding, through the imposition of multiple punishments. *See, e.g., United States v. Woodward*, 469 U.S. 105, 109 (1985) (per curiam). Petitioner does not establish a necessity for separate prosecutions, however, by listing double jeopardy cases where different interests have been "taken into account," Pet. Br. 17, for the sole purpose of determining

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[1] As respondents' case demonstrates, the difference between the two interests is not always perceptible. Unlike the typical contempt case, where "the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings," *Young*, 481 U.S. at 800 (footnote omitted), the duties to which respondents were subjected by the court – to obey the law – preexisted their participation in judicial proceedings.

if the legislature intended to allow cumulative punishments in a single proceeding. *See Ball v. United States*, 470 U.S. 856 (1985); *United States v. Woodward, supra; Albernaz v. United States*, 450 U.S. 333 (1981).[2]

Nor is there any basis for the specter petitioner raises of transformation of the limited contempt power into unconstitutional control over the Executive's power to prosecute crimes. Pet. Br. 18-21. The notion that a court needs absolute authority to conduct a non-summary contempt prosecution, despite the Executive's objection or before the Executive has an opportunity to bring a criminal code prosecution, cannot be reconciled with this Court's cases on the regulation of the contempt power.

In *Young* the Court held that the inherent judicial authority "to initiate contempt proceedings for disobedience to [court] orders . . . necessarily encompasses the ability to appoint a private attorney to prosecute the

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[2] In *Young*, the United States took the position that when a contemnor's conduct in violation of a court order also violates a federal criminal statute, a single prosecution fully protects both the court's authority and the interest underlying the criminal statute: "If the United States Attorney decides to prosecute the contemnor for the substantive offense, the interest underlying the contempt power – enforcing compliance with judicial orders – would also be vindicated." Brief for the United States as *Amicus Curiae* at 15, *Young v. United States ex rel. Vuitton et Fils S.A.* (No. 85-1329). If necessary, a count alleging contempt can be added to the indictment or information charging the criminal code offense. *Cf. United States v. Laurins*, 857 F.2d 529 (9th Cir. 1988) (indictment charging obstruction of justice and aiding and abetting contempt), *cert. denied*, 492 U.S. 906 (1989). *See generally* C. Wright, *Federal Practice and Procedure: Criminal 2d* § 710 & nn. 5-6 (1982).

contempt." 481 U.S. at 793. The Court cautioned, however, that exercise of this inherent power "must be restrained by the principle that 'only "[t]he least possible power adequate to the end proposed" should be used in contempt cases.' " *Id.* at 801 (quoting *United States v. Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821))). This "principle of restraint" means that a court may invoke its appointment power "only as a last resort." "The logic of this rationale is that a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied." *Id.* at 801.

The referral process assures a prosecutor an opportunity to advise the court whether a privately prosecuted contempt proceeding threatens an anticipated or contemplated prosecution under the criminal code. In practice, many courts will defer to the prosecutor. A reasonable delay of the contempt prosecution under these circumstances allows the prosecutor thoroughly to consider and prepare all the appropriate charges, while avoiding the expense and inconvenience of a separate, privately conducted contempt trial. Neither *Young*'s language nor its guiding principle of restraint implies that judicial vindication demands such urgency that normally the prosecutor cannot be given reasonable time (if requested) to bring appropriate charges to enforce the criminal laws.[3]

[3] Significantly, the United States argued in *Young* that this referral process would be "particularly appropriate when the contemnor's conduct in violation of an injunction also contravenes a federal criminal statute . . . . " U.S. Brief at 15. Thus it is odd that the United States now portrays this procedural restraint as a judicial license to override the prosecutor's objections.

Moreover, even if *Young* leaves any uncertainty on this point, it is clear either Congress or this Court could solve what is essentially a conflict over timing. Both Congress and the Court may regulate "[t]he manner in which the court's prosecution of contempt is exercised . . . . " *Young*, 481 U.S. at 799. This broad power to impose "reasonable regulation" is limited only by the requirement that " 'the attributes which inhere in [the contempt power] and are inseparable from it can neither be abrogated nor rendered practically inoperative.' " *Ibid* (quoting *Michaelson v. United States ex rel. Chicago, St. P., M., & O. R. Co.*, 266 U.S. 42, 66 (1924)). Requiring a court to defer a non-summary contempt proceeding for a reasonable period of time, to accommodate the legitimate interests of a co-equal Branch, comports with the principle of restraint and does not unconstitutionally reduce a court's ability to protect itself. As this Court implicitly recognized in *Bloom*, unfettered judicial control over the timing of a non-summary contempt trial is not essential to the court's power of self-protection. 391 U.S. at 208-209. *Cf. Gompers v. United States*, 233 U.S. 604 (1914) (contempt power subject to statute of limitations).[4]

The facts in this case give no reason to fear that courts will run roughshod over federal prosecutors' calls

[4] Federal law currently imposes a far more comprehensive restraint on the criminal contempt powers of the court. Title 42 U.S.C. § 2000h-1 provides that because "[n]o person should be put twice in jeopardy under the laws of the United States[,] . . . an acquittal or conviction in a prosecution for a specific crime under the laws of the United States shall bar a proceeding for criminal contempt, which is based on the same act" arising under the Civil Rights Act of 1964.

for judicial restraint. The Assistant United States Attorney who prosecuted Dixon for contempt did not ask the judge to defer the contempt proceeding until trial on the cocaine possession indictment. In Foster's case, the United States Attorney's Office also did not request that the criminal contempt trial be postponed, apparently because the government clung to the mistaken notion, a year after the decision in *Young*, that a privately prosecuted criminal contempt proceeding is a "civil" matter. *See Young*, 481 U.S. at 804 ("criminal contempt proceedings arising out of civil litigation 'are between the public and the defendant, and are not a part of the original cause' ") (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 445).[5]

3. Unable to show any necessity for limiting the Double Jeopardy Clause, petitioner instead urges the Court to follow what it claims to be longstanding authority that successive prosecutions for contempt and a criminal code offense cannot place an individual in jeopardy twice for the same offense. *Cf. United States v. Felix*, 112 S.Ct. 1377 (1992) (conspiracy and substantive offense are not same offense). Petitioner's premise is wrong. This Court has never "held that successive prosecutions for contempt and for a substantive offense based on the same conduct were permissible." Pet. Br. 8.

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[5] Petitioner's "dual sovereignty" analogy lacks any merit. The doctrine does not apply "where the two tribunals that tried the accused exert all their powers under and by authority of the same government – that of the United States." *Grafton v. United States*, 206 U.S. 333, 354-355 (1907).

The language from *Debs* on which petitioner bases its argument (that a criminal prosecution would not be barred by a contempt prosecution) is clearly *dicta*. Because *Debs* involved the question whether the Constitution guarantees the right to a jury in a contempt trial, the issue of barring a subsequent prosecution under the criminal code was academic, *see* 158 U.S. at 594 ("If any criminal prosecution be brought . . . . "), and the Court did not even decide whether the allegedly contemptuous acts violated any statute. *See id.* (defendants' acts "may or may not have been violations of the criminal law").[6]

Colombo v. New York, 405 U.S. 9 (1972) (per curiam), provided the first opportunity to address the issue now before the Court. Colombo was held in contempt, sentenced to 30 days in jail and fined after defying an order to respond to a grand jury's questions. He was then indicted under a provision of the penal code which made it a crime to commit a contempt of court. The New York Court of Appeals held that double jeopardy principles did not bar the indictment, because Colombo's initial contempt commitment was for civil contempt, and because he committed separate contemptuous acts by refusing the grand jury's questions and by disobeying the

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[6] Two cases involving Congress' contempt power are also unhelpful. *See In re Chapman*, 166 U.S. 661 (1897); *Jurney v. MacCracken*, 294 U.S. 125 (1935). Neither case involved two prosecutions or concerned the relationship between the Judiciary and the Executive. *Chapman* held that the statute making contempt of Congress a crime (now 2 U.S.C. § 194) is constitutional. 166 U.S. at 672. *Jurney v. MacCracken* held that the statutory offense of contempt of Congress does not impair Congress' inherent authority to punish a contempt. 294 U.S. at 151.

judge's order. 405 U.S. at 10. This Court held that "[f]or purposes of the Double Jeopardy Clause, petitioner was confined and penalized for criminal contempt." *Id.* at 11 (citations omitted). Because of a state law question whether the prosecutions covered one or two acts, the Court remanded to allow the New York court "the opportunity to reconsider the validity of the indictment under the Double Jeopardy Clause of the Constitution." *Ibid.*

This resolution would have been inappropriate if a criminal contempt – prosecuted in a judicially-initiated proceeding – could never be the "same offense" for successive prosecution purposes as a criminal code offense. Had the *dicta* in *Debs* been controlling, as petitioner urges, whether Colombo committed one or two acts would not have presented a constitutional question.[7]

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[7] *Colombo* arguably did more than reject any commitment to *Debs' dicta*. The history of the litigation suggests the Court was rejecting the argument that successive prosecutions are permitted merely because two arms of the government prosecute in pursuit of separate interests. *Colombo* had come before the Court once before. *Colombo v. New York*, 400 U.S. 16 (1970) (per curiam). *See Colombo*, 405 U.S. at 12 (Douglas, J., dissenting). The Court had remanded for further consideration in light of *Waller v. Florida*, 397 U.S. 387 (1970), which held that a State and a municipality are the same sovereign for double jeopardy purposes. 397 U.S. at 394-395.

On the first remand the New York Court of Appeals concluded that successive prosecution was not barred, because the judicially-initiated contempt "vindicate[s] the power of our courts" while the statutory crime "protects the interest of the State to obtain evidence which will benefit the community as a whole . . . . " *People v. Colombo*, 271 N.E.2d 694, 695 (N.Y. 1971),

Menna v. New York, 423 U.S. 61 (1975) (per curiam), involved the relationship between the same New York statutes. This time, petitioner pled guilty to the criminal code indictment after his motion to dismiss on double jeopardy grounds was rejected. The New York Court of Appeals held that petitioner waived any double jeopardy claim by pleading guilty. *Id.* at 61-62. This Court reversed, holding that a counseled guilty plea may be vacated "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge. . . . " *Id.* at 62. As in *Colombo*, the Court remanded for a determination of the double jeopardy argument, on whose merits the Court expressed "no view." *Id.* at 63. As in *Colombo*, a remand would have been inappropriate if *Debs' dicta* were controlling.[8]

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vacated, *Colombo v. New York*, 405 U.S. 9 (1972), *on remand*, 293 N.E.2d 247 (N.Y. 1972).

New York opposed the second petition for writ of certiorari in part on the grounds that *Debs* supported the judgment. *See* Supp. Br. in Opp. to Pet. at 8, *Colombo v. New York* (No. 71-352). This Court would not have remanded a second time if persuaded that this separate interest analysis resolved the double jeopardy question. After the second remand, the Court of Appeals dismissed the indictment. 293 N.E.2d 247.

[8] Petitioner dismisses *Colombo* and *Menna* in a footnote, because the criminal code offense in those cases was entitled "contempt." Pet. Br. 14 n.15. Petitioner has not suggested, however, that the result in this case should turn on the label attached to a criminal code offense. New York could have called the criminal code offense "obstruction of justice" or "breach of peace in vicinity of the court." Under petitioner's theory, prosecution of these renamed offenses after a previous contempt prosecution would necessarily be for different offenses, because the two prosecutions serve different interests, and different

Decisions by lower federal and state courts also refute petitioner's argument. The issue has arisen twice in federal court in the last 65 years, and in both cases the courts barred further prosecution, after concluding that normal double jeopardy principles fully apply in deciding whether a contempt trial and a prosecution under the criminal code involve the same offense. *United States v. Haggerty*, 528 F. Supp. 1286 (D. Colo. 1981) (prosecution for striking while holding government position barred by prior contempt proceeding for violating order not to strike); *United States v. United States Gypsum Company*, 404 F. Supp. 619 (D.D.C. 1975) (contempt proceeding for violating price fixing decree barred by prosecution for price fixing). The facts of these cases are essentially indistinguishable from respondents' case, because each involved a contempt prosecution that in a practical sense required the government to prove the commission of an offense under the criminal code. *See Haggerty*, 528 F. Supp. at 1297 (felony prosecution "essentially a prosecution for a lesser included offense" of contempt); *United States Gypsum Co.*, 404 F. Supp. at 622 (contempt proceeding would be "replay" of criminal prosecution). In addition, before this Court's decision in *Grady*, several state courts (including some which looked to *Colombo* for guidance) had concluded that normal double jeopardy principles apply in determining whether a contempt

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branches of government initiate them. This result cannot be reconciled with *Colombo* and *Menna*.

prosecution bars subsequent prosecution under the criminal code.[9]

Petitioner is also mistaken in claiming that the reasoning in the "overwhelming majority" of pre-*Grady* lower court decisions "remain[s] sound today." Pet. Br. 8. The reasoning in petitioner's cases has been undermined by changes made by this Court in the law of contempt and double jeopardy, independent of this Court's decision in *Grady*.

Many of the cases petitioner relies on found no double jeopardy bar after applying the test of *Blockburger v. United States*, 284 U.S. 299, 304 (1932), which compares the abstract elements of the statutory definitions of contempt and the criminal code offense.[10] These cases show merely that if the multiple prosecution inquiry is restricted to the *Blockburger* legislative intent question, then generally a criminal code offense will not be the same offense as contempt. Whether or not *Blockburger* should be the only test in successive prosecutions, *see infra* at 29-49, the resolution of that issue is not unique to

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[9] *State v. Hope*, 449 So. 2d 633 (La. Ct. App. 1989); *State v. McIntyre*, 764 P.2d 972 (Or. Ct. App. 1988) (state law grounds); *People v. Rodriguez*, 514 N.E.2d 1033 (Ill. App. Ct. 1987), *appeal denied*, 520 N.E.2d 391 (Ill. 1988); *State v. Thompson*, 659 P.2d 383, 386 (Or. 1983) (state law grounds) (citing *Colombo*); *People v. Lombardo*, 123 Cal. Rptr. 755, 758 (Cal. App. 1975) (citing *Colombo*).

[10] *United States v. Ferrugia*, 604 F. Supp. 668 (E.D.N.Y. 1985); *People v. Totten*, 514 N.E.2d 959 (Ill. 1987); *Commonwealth v. Gallarelli*, 362 N.E.2d 923 (Mass. 1977); *Commonwealth v. Allen*, 486 A.2d 363 (Pa. 1984), *cert. denied*, 474 U.S. 842 (1985); *State v. Sammons*, 656 S.W.2d 862 (Tenn. Crim. App. 1982).

the law of criminal contempt.[11] These cases, therefore, do not establish an exception to double jeopardy law for successive prosecutions involving criminal contempts and prosecutions under the criminal code.

Many of the cases cited by petitioner justify their result only by uncritical citation to *Debs* and its progeny or the "established rule" that double jeopardy is no bar to successive prosecutions involving criminal contempt and criminal code offenses.[12] The rest are either summary contempt cases[13] or rely on a concept of necessity this

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[11] For example, petitioner cites *People v. Totten*, 514 N.E.2d 959 (Ill. 1987), which applied *Blockburger* to find no jeopardy bar between contempt and battery prosecutions. In a subsequent case, however, an Illinois court applied *Totten* (and therefore *Blockburger*) and concluded that while a criminal contempt conviction did not bar a burglary prosecution, it did bar a child abduction prosecution under a statute which required proof of violation of "a valid court order." *People v. Rodriguez*, 514 N.E.2d 1033, 1037 (Ill. App. 1987).

[12] *Church v. State*, 111 So.2d 228 (Miss. 1950); *Nicholas v. Commonwealth*, 45 S.E.2d 305 (Va. 1947); *Orban v. United States*, 18 F.2d 374 (6th Cir. 1927); *Hansen v. United States*, 1 F.2d 316 (7th Cir. 1924); *Ex parte Morris*, 227 P. 914 (Cal. 1924); *Lewinsohn v. United States*, 278 F. 421 (7th Cir. 1921), *cert. denied*, 258 U.S. 630 (1922); *Long v. Commonwealth*, 197 S.W. 843 (Ky. 1917); *Merchants' Stock & Grain Co. v. Board of Trade*, 201 F. 20 (8th Cir. 1912); *Chicago Directory Co. v. United States Directory Co.*, 123 F. 194 (C.C.S.D.N.Y. 1903); *Fisher v. McDaniel*, 64 P. 1056 (Wyo. 1901); *Middlebrook v. State*, 43 Conn. 257 (1876).

[13] *United States v. Ferrugia*, 604 F. Supp. 668 (E.D.N.Y. 1985); *Maples v. State*, 565 S.W.2d 202 (Tenn. 1978); *United States v. Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971); *United States v. Mirra*, 220 F. Supp. 361 (S.D.N.Y. 1963); *O'Malley v. United States*, 128 F.2d 676 (8th Cir. 1942), *rev'd sub nom. Pendergast v. United States*, 317 U.S. 412 (1943); *Long v. Commonwealth*, 197 S.W. 843 (Ky. 1917); *State v. Yancy*, 4 N.C. (Car. L. Dep.) 133 (1813).

Court has rejected for non-summary contempts.[14] In light of the principle of necessity that has animated all of this Court's contemporary contempt decisions, petitioner's cases do not provide any basis for refusing an individual successively prosecuted for criminal contempt and a criminal code offense the protection of the Double Jeopardy Clause.

4. *Amici* argue that if a privately prosecuted contempt can raise a constitutional bar to a subsequent criminal prosecution, the States' civil protection schemes will be seriously undermined as domestic violence victims are forced to choose between contempt proceedings and criminal prosecutions. In *amici*'s view, private contempt prosecutions provide a mechanism for preventing additional harm to domestic violence victims, because public prosecutors do not give sufficient priority to contempts based on violations of protection orders, and law enforcement officials sometimes hinder effective criminal prosecution.

These are serious concerns. Effective response to the problem of domestic violence, however, does not require erosion of the Double Jeopardy Clause. Moreover, *amici*'s arguments are largely misdirected. Criminal contempt is not designed to be a surrogate for an inadequate criminal

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[14] *State v. Newell*, 532 So.2d 1114 (Fla. Dist. Ct. App. 1988); *Barrowman v. State ex rel. Evans*, 381 S.W.2d 251 (Tenn. 1964). Petitioner's only other case, *State v. Chapman*, 739 P.2d 310 (Idaho 1987), merely finds that the defendant committed two acts.

justice system. Criminal contempt proceedings "are designed to serve the limited purpose of vindicating the authority of the court." *Young*, 481 U.S. at 800. Although a victim of domestic violence may derive some security from a contempt punishment, this is an "incidental benefit" of the criminal contempt process, *see Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 443, and therefore cannot be essential to the court's ability to "preserve respect for the judicial system itself." *Young*, 481 U.S. at 800. *Amici*'s claim that a complainant prosecuting a criminal contempt "proceed[s] in her own right in an equity cause," *Amici* Br. 17, cannot be reconciled with the statements in *Young*, 481 U.S. at 804, and *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988), that a private attorney prosecuting a criminal contempt represents the government. In urging the Court to allow a criminal contempt proceeding to do the work of the criminal justice system, *amici* undermine the rationale for the criminal contempt power.

For the same reason, although *amici* understandably look to criminal contempt for quicker relief than an unresponsive criminal justice system provides, they are asking criminal contempt to serve the wrong function. The primary purpose of a criminal contempt proceeding is to protect the court. To protect the community, States may enact regulatory schemes for detaining dangerous persons pending trial. *See United States v. Salerno*, 481 U.S. 739 (1987) (federal pretrial detention statute); *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc) (D.C. pretrial detention statute), *cert. denied*, 455 U.S. 1022 (1982).

Similarly, the role of interested parties in prosecuting contempts based on violations of protection orders does

not justify curtailment of the Double Jeopardy Clause. In *Young*, this Court used its supervisory authority over the federal courts "to hold that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." 481 U.S. at 809 (footnote omitted). Because the Court did not decide the constitutionality of this practice, *see id.* n.21, States and local jurisdictions may still follow it.[15] However, a policy which is incompatible with notions of fairness in federal court, *id.* at 809, cannot be a necessary component of the ability of State judges to vindicate their authority. In fact, the willingness of victims' attorneys to prosecute criminal contempts may encourage busy prosecutors in state courts not to put their limited resources behind domestic violence matters.

There is good reason to believe that as the States continue to take domestic violence more seriously, the criminal justice system will assume a burden now improperly borne by criminal contempt proceedings. State court family judges have recommended "[m]aking violation of protection orders a criminal offense," National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice* § I(3)(l) (1990) (hereafter *"Improving Court Practice"*), and thirty-eight States now have statutes which appear to provide criminal penalties for the violation of protection orders or

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[15] The District of Columbia Court of Appeals has never decided whether complainants may prosecute contempts arising out of CPO violations. One trial judge has held that *Young* does not preclude this practice in the District of Columbia courts. *Castellanos v. Novoa*, 127 Daily Wash. L. Rptr. 1192, 1193-94 (D.C. Super. Ct. April 27, 1989).

certain aspects of these orders.[16] New policies for combatting domestic violence include mandatory arrest requirements and mandatory training for police officers, *see, e.g.*, D.C. Code Ann. §§ 16-1031, -1034 (1991 Supp.); D.

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[16] Alaska Stat. § 11.56.740 (Supp. 1991); Ariz. Rev. Stat. Ann. §§ 13-3602(I) (Supp. 1991), 13-2810 (1989); Ark. Code Ann. §§ 9-15-207, 5-53-134 (Michie Supp. 1991); Cal. Penal Code § 273.6 (West 1988 & Supp. 1992); Colo. Rev. Stat. Ann. § 18-6-803.5 (West Supp. 1991); Conn. Gen. Stat. Ann. § 46b-38c(e) (West 1992); Del. Code Ann. tit. 11, § 1271 (1987 & Supp. 1990) (crime of contempt); Fla. Stat. Ann. § 741.31 (West Supp. 1992); Ga. Code Ann. § 19-13-6(b) (Michie 1991); Haw. Rev. Stat. § 586-11 (1988); Idaho Code § 39-6312 (Supp. 1992); Ill. Rev. Stat. ch. 40, para. 2312-21(c), ch. 38, para. 12-30 (Smith-Hurd Supp. 1992); Kan. Stat. Ann. § 60-3107(g) (Supp. 1991); Ky. Rev. Stat. Ann. § 403.760 (Baldwin 1990) (crime of contempt); Me. Rev. Stat. Ann. tit. 19, § 769 (West 1981); Md. Code Ann. Fam. Law §§ 4-507, 4-510 (1991); Mass. Gen. Laws Ann. ch. 209A, § 7 (West Supp. 1992); Minn. Stat. Ann. § 518B.01, Subd. 14(a) (West 1990 & Supp. 1992); Mo. Stat. Ann. § 455.085(8) (Vernon Supp. 1992); Mont. Code Ann. § 45-5-626 (1991); Neb. Rev. Stat. § 42-924 (1988); Nev. Rev. Stat. Ann. § 125.560 (Michie Supp. 1991); N.J. Stat. Ann. §§ 2C:25-15(b), 2C:29-9(b) (West Supp. 1991); N.Y. FAM. CT. ACT § 846-a (McKinney 1983); N.D. Cent. Code § 14-07.1-06 (1991); Ohio Rev. Code Ann. § 2919.27 (Anderson 1987 & Supp. 1991); Okla. Stat. Ann. tit. 22, § 60.6 (West Supp. 1992); R.I. Gen. Laws § 15-15-3(3) (1988 & Supp. 1991); S.C. Code Ann. § 16-25-50 (Law. Co-op 1985); S.D. Codified Laws Ann. § 25-10-13 (1984); Tex. Fam. Code Ann. § 71.16(b) (West Supp. 1992); Utah Code Ann. §§ 30-6-6(4), 76-5-108, 77-36-3(2) (Supp. 1991); Vt. Stat. Ann. tit. 13, § 1030; tit. 15, § 1104(d) (Supp. 1991); Va. Code Ann. § 16.1-253.2 (Michie Supp. 1992); Wash. Rev. Code Ann. § 26.50.110(1) (West 1986 & Supp. 1992); W. Va. Code § 48-2A-11 (1992); Wis. Stat. Ann. § 813.12(8) (West Supp. 1991); Wyo. Stat. §§ 35-21-106(c), 6-4-404 (1988).

Robinson, Congressional Research Service, *Family Violence: Background, Issues, and the State and Federal Response* 25 (1992), improved charging policies less intimidating to victims, and court docket priorities reflecting the seriousness of family violence. *See Improving Court Practices* at §§ III(B)(4) & (C)(11). For reasons apparently independent of the constitutional prohibition against multiple prosecutions for the same offense, state judges have recommended that "cases involving the same family and family issues should be consolidated in *one* court proceeding utilizing the full range of civil and criminal remedies." *Id.* at § III(C)(10) (emphasis added).

These and other steps can and probably should be taken. However, they do not require or justify any restriction of a right expressly provided in the Constitution.

B. Under Any Test Other Than A Strict Application Of *Blockburger*, It Is Clear That Respondents Were Prosecuted Twice For The Same Offense

Petitioner argues that *Grady v. Corbin* should be read to allow successive prosecutions in this case and that, if *Grady* cannot be read that narrowly, it should be overruled. These alternative arguments invoke strikingly different interpretations of *Grady*, as fully consistent with and limited by the Court's precedents, primarily *Harris v. Oklahoma*, 433 U.S. 682 (1977), and *Illinois v. Vitale*, 447 U.S. 410 (1980), on the one hand, and as a radical departure from established precedent, on the other hand. A full examination of petitioner's arguments requires a careful

assessment of *Grady*. An easy answer to petitioner's arguments, however, is that whether *Grady* was right or wrong ultimately makes no difference in this case. Under any test, with the possible exception of the most formalistic application of the test in *Blockburger v. United States*, 284 U.S. at 304, it is clear that further prosecution of respondents would violate the prohibition in the Double Jeopardy Clause of the Fifth Amendment against successive prosecutions for the same offense.

1. In *Grady*, this Court concluded that a prosecution for driving while intoxicated and failing to keep right of the median barred a subsequent prosecution for manslaughter, criminally negligent homicide and third-degree reckless assault, where the State admitted that it would reprove the offense of failing to keep right of the median in order to establish that the defendant operated the vehicle in a criminally negligent and reckless manner. The Court's holding in *Grady* has two significant aspects. First, the Court made clear that in a situation involving multiple prosecutions, as opposed to multiple punishments imposed after a single trial, an examination of the abstract elements of the offenses will not necessarily resolve the constitutional issue, because even if the legislature intended for two offenses to be different, legislative intent is not the end of the inquiry. Thus, strict application of the *Blockburger* test, which looks at the abstract elements of an offense as defined by the legislature as a tool for determining legislative intent, will not necessarily resolve whether successive prosecutions violate the double jeopardy guarantee. 495 U.S. at 521.

Grady's analysis reflects sound principles of double jeopardy jurisprudence and a history in which this Court

has refused to allow the guarantee against successive prosecutions to be sacrificed to any mechanical test. Building on *In re Nielsen*, 131 U.S. 176 (1889), where the Court barred successive prosecutions for adultery and cohabitation, this Court repeatedly has recognized that, in successive prosecution cases, application of the *Blockburger* legislative intent test does not necessarily end the constitutional inquiry. Thus, in *Brown v. Ohio*, 432 U.S. 161, 166 n.6 (1977), the Court cited *Nielsen* and stated that "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." In *Harris*, although felony murder and robbery were separate offenses under *Blockburger*, the Court cited *Nielsen* and *Brown* to support its holding that "[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." 433 U.S. at 682. In *Vitale*, the Court relied on *Harris* to suggest that a prosecution for manslaughter would be barred by a previous conviction for failing to reduce speed to avoid an accident if "to sustain its manslaughter case the State . . . find[s] it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure." 447 U.S. at 420.

Garrett v. United States, 471 U.S. 773 (1985), also reflects this Court's recognition that, in the context of successive prosecutions, the Double Jeopardy Clause requires a test that does more than measure adherence to

legislative intent. Garrett was first prosecuted for importation of marijuana, then for engaging in a continuing criminal enterprise (CCE). Proof of the importation offense was used to establish one of the predicate offenses needed to prove the CCE offense. After reviewing the legislative history of the CCE statute, the Court found clear legislative intent to permit prosecution for CCE and the predicate offenses. *Id.* at 778-786. Because the case involved successive prosecutions, however, the Court found it necessary to go beyond an analysis of the statute and the intent of the legislature: "In order to properly analyze the successive prosecution issue, we must examine not only the statute which Congress enacted, but also the charges which form the basis of the Government's prosecution here." *Id.* at 786. The Court then examined in detail "the *conduct* in which Garrett was charged with engaging." *Id.* at 788 (emphasis added).[17]

In *United States v. Halper*, 490 U.S. 435, 451 & n.10 (1989), this Court again underscored the greater protections afforded in successive prosecution cases. *See also United States v. Sabella*, 272 F.2d 206, 211 (2d Cir. 1959) (Friendly, J.) (refusing to give undue effect to " 'refinements . . . so thin that, if they hold, the old and substantial protection against trial or conviction more than once for the same offense is but a shadow of its intended self' ") (quoting *District of Columbia v. Buckley*, 128 F.2d 17, 22 (D.C. Cir.), *cert. denied*, 317 U.S. 658 (1942)), *cited with*

[17] The Court concluded that the case came within the exception to the Double Jeopardy Clause first recognized in *Diaz v. United States*, 223 U.S. 442 (1912). *See* 471 U.S. at 791.

approval in United States v. Sanabria, 437 U.S. 54, 72 n.28 (1978).[18]

The second aspect of the decision in *Grady* is the test it articulates for determining whether, as a practical matter, in light of the government's theory of prosecution, the two offenses are the same. 495 U.S. at 521 & n.11. In resolving that question, the statutory elements of the offense are, of course, the starting point. But the Court recognized that the Constitution is not satisfied simply because the two offenses in theory may require proof of different facts, if, in practice, the government will have to reprove one offense in order to prove the other.

Petitioner does not appear to quarrel with *Grady*'s conclusion that double jeopardy means more than legislative intent in successive prosecutions. Its argument, rather, is that the cases in which the *Blockburger* test can be ignored should be limited to the precise circumstances in *Harris*, *Vitale* and *Grady*. In all other circumstances (except where *Blockburger* would bar a subsequent prosecution, such as RICO or CCE), petitioner maintains that

[18] Prior to *Grady*, a number of lower courts had reached the same conclusion. As the Court of Appeals for the Fourth Circuit recognized, "[g]iven the multiplicity of offenses that may arise from a single criminal transaction, the formalistic *Blockburger* test, with its narrow focus on the technical elements of the offenses charged, is inadequate to vindicate this constitutional guarantee against retrial. The general test for determining whether successive prosecutions involve the 'same offense' is therefore a more flexible and pragmatic one, which focuses not on the formal elements of the two offenses but rather on the proof actually utilized to establish them." *United States v. Ragins*, 840 F.2d 1184, 1188 (4th Cir. 1988). *See also State v. Lonergan*, 566 A.2d 677 (Conn. 1989), *cert. denied*, 496 U.S. 905 (1990).

Blockburger should be strictly applied. Pet. Br. 42-46. There are several significant flaws in petitioner's argument.

First and most important, with or without the test articulated in *Grady*, this case fits squarely within the scope of the principles on which the Court has relied in articulating the protections against multiple prosecutions. *Grady* simply confirms that *Harris* and *Vitale* control this case.

2. In an obvious and practical sense, the federal government has already prosecuted respondents for the criminal code offenses in the pending indictments. At their contempt trials respondents were charged with violating court orders by committing the criminal code offenses of possession with intent to distribute cocaine, assault and threats, and the trial courts required the government to prove commission of these offenses as elements of the contempts. In any further prosecution of respondents, the government would necessarily prove for a second time these same offenses, based on the identical conduct, it proved successfully (in Foster's case, partially successfully) at the first trials. The only difference would be that during the second round of prosecutions, the government could prove less than before. To convict respondents of contempt, the government had to prove their knowledge of the court orders not to violate the criminal code (in Foster's case specified provisions of the criminal code). To convict respondents of the pending offenses, the government would not have to prove their knowledge of the law.

As the Court made clear in *Harris*, when the offense charged in the first prosecution requires the government to prove as an element the crime it seeks to prosecute subsequently, the Double Jeopardy Clause stands as a bar to further prosecution. Although a contempt theoretically could be proved without establishing commission of a criminal code offense, and proof of a criminal code offense does not necessarily establish an element of all contempts, respondents were charged with contempts which made it necessary for the government to prove all the ingredients of the criminal code offenses.[19]

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[19] Petitioner agrees that under *Harris* an offense which includes other offenses by "generic reference" is the "same offense" for double jeopardy purposes as any specific offense included by reference in the initial charging document. *See* Pet. Br. 28 n.13.

Contempt is perhaps the most comprehensive of all "generic reference" offenses. In fact, 18 U.S.C. § 401 does not so much define a crime with statutory elements, as recognize a judicial power to punish certain classes of conduct as contempts. *See* R. Goldfarb, *The Contempt Power* 232 (1963) (Contempts "are not offenses defined by a criminal statute as are other crimes. Contempt is the statutory creation of a power, not an offense"). The Oklahoma felony murder statute involved in *Harris* restricted the indictment to the incorporation of a felony. *See Vitale*, 447 U.S. at 420 n.9. A document charging criminal contempt may incorporate by reference any crime in the entire code, so long as this incorporation is consistent with the terms of the original court order.

Moreover, so long as the court provides a jury in the contempt trial, there is no statutory limit in 18 U.S.C. § 401 (or D.C. Code Ann. § 11-944 (1989 Repl.)) to the sentence that could be imposed. In this sense, the contempt is not only the more inclusive offense, it is potentially the "greater" offense as well. Petitioner misconstrues District of Columbia law in characterizing the contempt offenses applicable to respondents as "petty

Respondents also prevail under the multiple prosecution test in *Vitale*. In *Vitale* the State attempted to prosecute the defendant for manslaughter after his previous conviction for failing to reduce speed to avoid a fatal collision. On the basis of an analogy to *Harris*, the Court suggested that "if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy. . . . " 447 U.S. at 421. There is no dispute in this case that the government found it necessary to "rel[y] on and prove[]" the crimes defined by the criminal code at respondents' contempt trials.[20]

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offenses." Pet. Br. 20. It appears that both respondents could have been prosecuted under § 11-944, had the courts chosen to do so. *See Caldwell v. United States*, 595 A.2d 961, 964-66 (D.C. 1991) (because legislative history of D.C. Code § 23-1329 reveals no intent by Congress to override the unlimited sentencing provisions of § 11-944 in cases involving violations of pretrial release conditions, § 11-944 remains available).

Petitioner also misstates the penalty in 1988 for possession of cocaine with intent to distribute it. The applicable provision is D.C. Code Ann. § 33-541(a)(2)(B) (1988 Repl.) (5 years) and not D.C. Code Ann. § 33-541(a)(2)(A) (1988 Repl.) (15 years), as petitioner contends. Pet. Br. 20-21 n.8, 3a. *Compare* D.C. Code Ann. § 33-501(15) (1988 Repl.) *with* D.C. Code Ann. § 33-501(15)(D) (1991 Supp.) (now defining cocaine as "narcotic drug" within meaning of § 33-541).

[20] Petitioner's effort to distinguish *Vitale* and *Grady* is unavailing. "Unlike in *Vitale* and *Grady*," according to petitioner, "[t]he substantive crimes [in respondents' case], as legally defined, establish nothing with respect to the offense of contempt. . . . " Pet. Br. 31. But if that were not equally true in *Vitale* and *Grady*, those cases could have been decided under a strict application of *Blockburger*, rather than under a test that

As the Court recently recognized in *United States v. Felix*, 112 S. Ct. 1377, 1384 (1992), *Grady* was simply an application of the rule suggested in *Vitale*. *Grady* is significant here because its articulation of the practical sense in which two offenses based on the same conduct are the same offense for multiple prosecution purposes confirms the applicability of the *Vitale/Grady* rule to this case.[21]

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included an examination of the government's theory of prosecution to determine whether the assault and robbery charges were "*in effect* lesser included offenses" of the felony murder and manslaughter offenses. Pet. Br. 26 (emphasis added). Thus it muddies the water for petitioner to suggest that "[e]ven without reference to the particular facts of those cases, the Court viewed the traffic violation as sufficient to prove the 'carelessness' element" of the manslaughters. Pet. Br. 30. As *Grady* and *Vitale* make clear, reference must be made to *something* beyond the legal definition of the offenses. Petitioner elsewhere concedes that the something is "the State's theory of the case. . . . " Pet. Br. 26. Petitioner does not dispute that the prosecutor's theory of the case required proof of the criminal code offenses in respondents' case. For similar reasons, it is irrelevant that a non-technical species of lesser included offense will not meet the technical definition of lesser included offense. *See Schmuck v. United States*, 489 U.S. 705, 717, 718 (1989). Pet. Br. 30.

[21] The Court offered two formulations of its test, depending upon the order of prosection. First, "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 521 (footnote omitted). "Similarly, if in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy Clause would bar subsequent prosecution of the component offense." *Id.* n.11.

Respondents' case not only fits easily within the *Grady* formulation, as the court of appeals found and petitioner concedes, but it also appears to be precisely the type of situation the Court had in mind in formulating the test. *Grady* arose in the context of the "classically simple situation presented in *Brown* [v. *Ohio*]. . . . " *Felix*, 112 S.Ct. at 1385 (quoting *Garrett v. United States*, 471 U.S. at 789). *Brown* involved a discrete course of conduct underlying the offense of joyriding, circumscribed in time and place, which was entirely congruent with the offense of auto theft. "Every minute that Nathaniel Brown drove or possessed the stolen automobile he was simultaneously committing both the lesser included misdemeanor and the greater felony. . . . " *Garrett*, 471 U.S. at 789.

The same is true in respondents' case. At every moment when Dixon acted contemptuously by possessing cocaine with the intent to distribute, he was violating D.C. Code Ann. § 33-541(a)(1), and at every moment he violated the criminal code he was simultaneously in contempt. Foster's case presents the same congruence of conduct.

Moreover, even if the order of prosecution in respondents' cases were reversed, they would present common sense examples of *Grady*'s "essential element" requirement. Proof of the criminal code offenses formed the essence, indeed nearly the entirety, of the initial prosecutions. The judge at Dixon's trial considered proof that Dixon knew of the release condition to be a "technicality," because "the Government's burden [was] to show that there was in fact a crime committed by the defendant while he was on pretrial release." J.A. 14. The judge at

Foster's trial made only passing reference to Foster's awareness of the CPO. J.A. 39. The reality was that respondents' liberty depended on whether the government could prove they committed criminal code offenses. If those offenses were successfully prosecuted, there was no other conduct which had to be established.

Finally, these cases present none of the difficulties in drawing a line between the test in *Grady* and the endorsement in *Dowling v. United States*, 493 U.S. 342 (1990), of the "principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." *Felix*, 112 S.Ct. at 1383 (footnote omitted). In respondents' cases, the two crimes were identical in both time and place, the conduct linking the two offenses was entirely symmetrical, and, unlike *Felix* (or the typical Federal Rule of Evidence 404(b) situation), the factfinder's failure to conclude that the other crime was proved beyond a reasonable doubt would be fatal to the government's proof of criminal contempt as a matter of law. *See id.* at 1382.

Because respondents already have been prosecuted for the same offense, further prosecution would violate every principle this Court has identified as animating the protection against multiple prosecutions. As petitioner concedes, Pet. Reply on Pet. for Cert. at 9, a defendant charged with non-summary contempt must run the same "gantlet" as any other defendant. *See Green v. United States*, 355 U.S. 184, 190 (1957). A second prosecution for the same offense requires the defendant to run the same "gantlet" twice and subjects him or her to exactly the "embarrassment, expense . . . ordeal and . . . continuing state of anxiety" the Double Jeopardy Clause forbids. *Id.*

at 187. What the Double Jeopardy Clause establishes is, in effect, " 'a constitutional policy of finality for the defendant's benefit,' " *Brown v. Ohio*, 432 U.S. at 165 (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)), a policy that "protects the accused from attempts to relitigate the facts underlying a prior acquittal" (as in Foster's case) and "from attempts to secure additional punishment after a prior conviction and sentence." *Id.* at 165-166.

3. Even if it were necessary to rely on the *Grady* test in order to decide this case, this Court should reject petitioner's invitation to overrule *Grady*, a precedent barely two years old that was reaffirmed by this Court just last Term. As this Court eloquently explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 60 U.S.L.W. 4795, 4801 (June 29, 1992) (citations omitted), "The obligation to follow precedent begins with necessity. . . . Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."

Petitioner's attempt to justify its request that the Court overrule *Grady* by urging that *Grady* is a departure from past precedents and has bred confusion in the lower courts is not borne out by case law. In addition, although petitioner insists that the *Grady* test should be rejected, it offers no replacement that is either workable or consistent with the double jeopardy interests at stake in multiple prosecutions. Instead, petitioner makes the remarkable argument that *Blockburger*, a test for determining legislative intent, should be determinative even in multiple prosecutions. Petitioner offers no principled

explanation of how the *Blockburger* test can satisfy the additional interests at stake in multiple prosecution cases.

Despite the impressive authority on which *Grady* is founded, petitioner asserts that *Grady* is inconsistent with a line of cases in which the Court has applied the "elements test" in successive prosecution cases. In particular, petitioner asserts that, contrary to the *Grady* Court's understanding, *In re Nielsen*, "is consistent with the use of the elements test to determine whether successive prosecutions are permitted." Pet. Br. 38.[22] If, by "elements

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[22] Petitioner asserts that the majority in *Grady* was incorrect in suggesting that the Court has not applied the elements test to successive prosecution claims since *Nielsen*. Pet. Br. at 37. In fact, what the majority in *Grady* said was that "this Court has not interpreted the Double Jeopardy Clause as Justice Scalia would interpret it since at least 1889." 495 U.S. at 517-18 n. 8. The majority in *Grady* is correct that since *Nielsen*, the Court has refused to limit double jeopardy protection in successive prosecutions to a question of legislative intent and thus to an abstract comparison of the elements of the offense as defined by the legislature. The majority also is correct that English common law and early American cases long have been rejected as defining the limits of double jeopardy protection. *See United States v. Scott*, 437 U.S. 82, 88 & n.5 (1978) (discussing *United States v. Ball*, 163 U.S. 662 (1896)); Mayers & Yarbrough, *Bis Vexari*: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 4, 7, 29 (1960), cited in *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (common law different from our double jeopardy guarantee, but at common law, one criminal act or series of acts in a single plan likely to yield only one offense; hence, the common law ancestors of the Double Jeopardy Clause provided adequate protection against multiple prosecutions). *See also Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.) ("the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal;

test," petitioner means the *Blockburger* formulation, its interpretation runs counter to the explicit recognition in *Nielsen* that, under the statutory definition of the offenses, adultery and cohabitation were not the same. It also runs counter to this Court's longstanding interpretation of *Nielsen*. *See, e.g., Brown v. Ohio*, 432 U.S. at 166 n.6. Petitioner's demonstration of the lengths to which the Court in *Nielsen* went to interpret cohabitation so that adultery could be considered a lesser included offense, Pet. Br. 38-40, hardly advances its argument. The significance of *Nielsen*, as Justice Powell and the Court recognized in *Brown*, is its decision to abandon the literal terms of the statutes in favor of its recognition that, as a practical matter, the defendant was being prosecuted twice for the same offense.

The other cases cited by petitioner are equally unavailing in casting *Grady* as a departure from precedent. Pet. Br. 37-38. To the extent that the cases relied on by petitioner can be said to have applied an "elements test," however, it certainly is not a literal application of the *Blockburger* test. In fact, the analysis in those cases is completely consistent with *Grady* and with the result reached by the court of appeals in this case.[23] In short,

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it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth").

[23] Petitioner itself acknowledges that *Harris* (and thus *Payne v. Virginia*, 468 U.S. 1062 (1984) (per curiam)) do not "strict[ly] adhere[]" to the *Blockburger* test. Pet. Br. at 42. Rather, the Court looked beyond the elements of the offenses as defined by the legislature to find the underlying offense supporting a felony murder conviction to be a "species of lesser included

even the cases relied on by petitioner establish that *Blockburger* has never been the end of the inquiry in successive

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offense." *Vitale*, 447 U.S. at 420; *Felix*, 112 S. Ct. at 1384. In *Brown v. Ohio*, the offenses were the same under *Blockburger*, so the Court did not have to look beyond the offenses as defined by the legislature. The Court specifically stated, however, that the double jeopardy analysis was not limited to *Blockburger*. 432 U.S. at 166 n.6. *United States v. Bayer*, 331 U.S. 532 (1947), was decided on the basis of the longstanding rule recognized in *Felix* that conspiracy and a substantive offense are separate offenses. In *Grafton v. United States*, 206 U.S. 333 (1907), the Court never mentioned an elements test in determining that a prosecution for manslaughter barred a subsequent prosecution for murder. The Court "rest[ed its] decision . . . upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court. . . ." *Id.* at 352. In *Burton v. United States*, 202 U.S. 344 (1906), the Court emphasized that because the defendant declined to plead additional facts and rested his double jeopardy defense on the face of the two indictments, the Court would have to decide the question "whether, upon the face of the record, *as a matter of law simply*," the offenses in the two indictments were the same. *Id.* at 379 (emphasis in original). The Court considered the evidence that would be necessary to prove the two offenses and concluded that "the same evidence would not have sustained each." *Id.* at 381.

The only case on petitioner's list that even purports to apply *Blockburger* in a successive prosecution case is *Gavieres v. United States*, 220 U.S. 338 (1911). In *Gavieres*, the Court determined that "evidence sufficient for conviction under the first charge [being drunk in public] would not have convicted under the second indictment [insulting a public official]," *id.* at 343, because in the first indictment, it was unnecessary to prove insult to a public official and in the second, it was unnecessary to prove that the defendant was drunk in a public place. Although the facts in the opinion are limited, it appears that

prosecutions. Rather, as *Nielsen*, *Brown*, *Harris*, *Vitale* and *Garrett* demonstrate, the Constitution also forbids a separate prosecution if, because of the facts of the case and the government's theory of prosecution, the government necessarily will prove the same offense twice.

Rather than a "departure from a long and unbroken string of precedent," Pet. Br. 35, *Grady* is no more radical than the precedents on which it relies. As the United States argued in *Felix*:

> [t]he *Grady* Court's formulation appears . . . to be an effort to put in general terms the . . . modest point that in order for two crimes to constitute the "same offense," one of them must be a lesser included offense of the other, either as a strictly legal matter or as a practical matter in light of the way the case is charged and tried. That is, it is not sufficient to avoid the double jeopardy bar that the second offense could theoretically be established without re-proving the first offense; if the government's theory of the case will require it to re-prove the first offense in order to establish the second, the second prosecution is barred. That interpretation of the

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Gavieres would come out the same way under *Grady*. *See* 495 U.S. at 523 & n.15. Even if *Gavieres* is inconsistent with *Grady*, it hardly supports petitioner's argument that *Grady* departs from past precedents, when *Gavieres's* exclusive reliance on *Blockburger* itself is inconsistent with numerous, more recent cases in which the Court has made clear that the *Blockburger* test, which looks only at the elements of the offenses as defined by the legislature, is not determinative of double jeopardy protections in successive prosecutions. *See, e.g.*, *Garrett v. United States*, 471 U.S. 773, 786 (1985).

> Court's language in *Grady*, we submit, is consistent with the facts that were before the Court in *Grady*, and it accommodates *Grady* to well-settled principles of double jeopardy law. . . .

Brief for Petitioner at 20, *United States v. Felix* (No. 90-1599).

Petitioner next asserts that the *Grady* formulation is confusing to the lower courts and therefore should be replaced with *Blockburger*, which is easier to apply and will work in most situations. Petitioner's reasoning is mistaken in several significant respects.

First, the lower courts are not in the state of confusion petitioner suggests over how to apply *Grady*.[24] Immediately after *Grady* there was disagreement in the lower courts over whether and how to apply *Grady* to more complicated offenses and how to reconcile *Grady* with *Dowling*.[25] *Felix* offered guidance on both of those

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[24] In fact, it was prior to *Grady* that the lower courts were confused, over whether *Blockburger* is the end of the inquiry in multiple prosecution cases. *See State v. Lonergan*, 566 A.2d at 683 (citing cases). *Grady* offered much needed guidance on that issue. With that fundamental issue resolved, in many cases the rest of the determination is easy. This case is a good example. Before *Grady* was decided, a major dispute in this case was whether *Blockburger* should be applied literally or with a more practical recognition of the offenses for which the defendants actually were being prosecuted. *See, e.g.*, Brief for Appellant at 24-36, *Foster v. United States*; Brief for Appellee at 21-35, *Foster v. United States*.

[25] *Compare, e.g., United States v. Gambino*, 920 F.2d 1108 (2d Cir. 1990), *vacated and remanded in light of Felix*, 112 S. Ct. 1657 (1992); *United States v. Calderone*, 917 F.2d 717 (2d Cir. 1990), *vacated and remanded in light of Felix*, 112 S. Ct. 1657 (1992); *with*

issues. 112 S. Ct. at 1382-83, 1383-85. *Felix* was decided only a few months ago, yet even in that time, it is apparent that the opinion went far toward clarifying the outstanding issues regarding *Grady*'s application. *Felix* reaffirmed *Grady*'s fundamental principle and the test articulated in *Grady* for application in a case that, like *Grady*, involved a "single course of conduct." 112 S. Ct. at 1385. In that context, *Grady*'s test is neither complex nor difficult to apply. It requires a court to examine both the elements of the offense and the government's theory of prosecution and determine whether, as the cases actually will be tried, the second offense necessarily will have been proven in the first prosecution, or vice versa. The lower courts are having no trouble applying *Grady* in cases involving a single course of conduct.[26] They also

United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991); *United States v. Clark*, 928 F.2d 639 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1701 (1992); *and McIntyre v. Trickey*, 938 F.2d 899 (8th Cir. 1991), *vacated sub nom. Caspari v. McIntyre*, 112 S. Ct. 1658 (1992).

[26] *See, e.g., Dayton Women's Health Center v. Enix*, 589 N.E.2d 121 (Ohio Ct. App. 1991), *cert. denied*, 60 U.S.L.W. 3879 (1992) (conviction for criminal trespass bars prosecution for contempt); *State v. Mojarro*, 816 P.2d 260 (Ariz. 1991) (bar to successive prosecutions for contempt and hindering prosecution, based on same refusal to testify); *State v. Magazine*, 393 S.E.2d 385 (S.C. 1990) (contempt for violating protection order bars prosecution for assault and battery); *Jivers v. South Carolina*, 406 S.E.2d 154 (S.C. 1991) (bar to successive [illegible]ecution for criminal domestic violence and assault and batte[illegible] with intent to kill); *Harrelson v. Mississippi*, 569 So.2d 295 (Miss. 1990) (plea to driving on the wrong side of the highway barred subsequent prosecution for aggravated assault); *Illinois v. Hoskinson*, 559 N.E.2d 11 (Ill. App. 1990) (conviction for failure to obey a police officer barred two counts of aggravated battery based on knowing the

agree that *Grady* does not apply to CCE or RICO.[27] There is no reason for this Court now to abandon the principle and test it so recently affirmed, particularly in a case like this, limited "both as to time and to place," *Felix*, 112 S.Ct. at 1385, where *Grady*'s formulation has proven to be a very useful test.[28]

Petitioner's reasoning is also flawed because it proceeds from a false premise, that the "right" test for determining whether two offenses are the same in multiple prosecution cases must be simple to apply. In fact, as this Court has recognized at least since 1907, "[i]t may be difficult at times to determine whether the offense for which [a defendant] is being tried is, in every substantial

individual harmed to be a peace officer, but not three other counts, based on proof that the person battered is on a public way).

[27] *See, e.g., United States v. McHan*, No. 91-5187 (4th Cir. May 4, 1992); *United States v. Arnoldt*, 947 F.2d 1120 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1666 (1992); *United States v. Smith*, 963 F.2d 892 (6th Cir. 1992); *United States v. Evans*, 951 F.2d 729 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1966 (1992); *United States v. O'Connor*, 953 F.2d 338 (7th Cir.), *cert. denied*, 112 S. Ct. 1979 (1992); *United States v. Link*, 921 F.2d 1523 (11th Cir.), *cert. denied*, 111 S.Ct. 2273 (1991).

[28] For similar reasons, this Court does not need to address in this case petitioner's Travel Act hypothetical, Br. at 31-32, which involves an offense that is limited neither as to time or place. In any event, if the government proved a murder beyond a reasonable doubt in order to satisfy an essential element of 18 U.S.C. § 1952, *see* Federal Judicial Center, *Modern Federal Jury Instructions, Pattern Criminal Jury Instructions* FJC-87 (1991), it is not clear why it would be contrary to the letter or spirit of the Double Jeopardy Clause to bar a second prosecution for exactly the same murder.

respect, the same offense for which he had been previously tried." *Grafton v. United States*, 206 U.S. at 355. The Court in *Grafton* declined to "attempt to formulate any rule by which every conceivable case must be solved." *Ibid.* The Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), voiced a similar recognition in concluding that no one easy test can be applied to determine whether, as a practical matter, a contested issue had been determined in favor of a defendant in a previous proceeding:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. . . . The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."

Ashe v. Swenson, 397 U.S. at 444.[29]

Moreover, petitioner concedes that *Blockburger*, if strictly applied,[30] will not work in all cases. Pet. Br. 42-46.

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[29] The federal circuits unanimously have adopted this sort of practical inquiry in determining, based on the "totality of the circumstances," whether a defendant has been prosecuted twice for the same conspiracy. *See United States v. Ragins*, 840 F.2d at 1188-89.

[30] Petitioner discusses "strict adherence" to *Blockburger*, as if applying *Blockburger* "not strictly" were in any respect different from what the Court did in *Grady*. Determining whether, as a practical matter, in a particular case, the elements of two offenses are the same is no different from what the Court did in *Grady* and what the lower court did in this case. In other words, if *Harris* is just a "not strict" application of *Blockburger*, then so is *Grady* and so is this case.

That concession is fatal to petitioner's argument. Petitioner offers no principle for determining when *Blockburger* will be either under- or over-inclusive. That question, of course, is the heart of the matter. *Grady* provides a principled analysis of the reasons why *Blockburger* does not work in all cases. It also offers a test that is consistent with the double jeopardy interests at stake in a multiple prosecution case for determining when, although two offenses pass *Blockburger*'s legislative intent test, in practice a defendant is being prosecuted twice for the same offense.

Whether or not questions will arise regarding application of *Grady*'s test as cases percolate up through the lower courts, it is clearly premature for this Court to address them. It would be particularly inappropriate to try to address those questions in this case. Whatever difficulties there may be in applying *Grady* to situations beyond the "classically simple situation" in *Grady, Felix*, 112 S. Ct. at 1385, they are not present here. Under any test but the most strained application of *Blockburger*, the conclusion is inescapable that respondents in this case were prosecuted twice for the same offense.

CONCLUSION

The judgments of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

1. D.C. Code Ann. § 11-944 (1989 Repl.) provides:

> In addition to the powers conferred by section 402 of title 18, United States Code, the Superior Court, or a judge thereof, may punish for disobedience of an order or for contempt committed in the presence of the court.

2. D.C. Code Ann. § 16-1003(a) (1989 Repl.) provides:

> Upon referral by the United States attorney, or upon application of any person or agency for a civil protection order with respect to an intrafamily offense committed or threatened, the Corporation Counsel may file a petition for civil protection in the Family Division. In the alternative to referral to the Corporation Counsel, a complainant on his or her own initiative may file a petition for civil protection in the Family Division.

3. D.C. Code Ann. § 16-1005 (1989 Repl.) provides, in pertinent part:

> (c) If, after hearing, the Family Division finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order –
>
> (1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family members;
>
> * * *
>
> (f) Violation of any temporary or permanent order issued under this chapter . . . shall be punishable as contempt.

4. D.C. Code Ann. § 22-501 (1989 Repl.) provides:

> Every person convicted of any assault with intent to kill . . . shall be sentenced to imprisonment for not less than 2 years or more than 15 years.

5. D.C. Code Ann. § 22-504 (1989 Repl.) provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than $500 or be imprisoned not more than 12 months, or both.

6. D.C. Code Ann. § 22-2307 (1989 Repl.) provides:

> Whoever threatens within the District of Columbia to . . . injure the person of another . . . shall be fined not more than $5,000 or imprisoned not more than 20 years, or both.

7. D.C. Code Ann. § 23-1321(a) (1989 Repl.) provides, in pertinent part:

> Any person charged with an offense . . . shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond . . . , unless the officer determines, in an exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required or the safety of any other person or the community. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or the safety of any other person or the community, or, if no single condition

> gives that assurance, any combination of the following conditions:
>
> * * *
>
> (5) Impose any other condition . . . .
>
> * * *

8. D.C. Code Ann. § 23-1329 (1989 Repl.) provides, in pertinent part:

> (a) A person who has been conditionally released pursuant to section 23-1321 and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.
>
> (b) Proceedings for revocation of release may be initiated on motion of the United States attorney. A warrant for the arrest of a person charged with violating a condition of release may be issued by a judicial officer and if such person is outside the District of Columbia he shall be brought before a judicial officer in the district where he is arrested and shall then be transferred to the District of Columbia for proceedings in accordance with this section. No order of revocation and detention shall be entered unless, after a hearing, the judicial officer finds that –
>
> (1) there is clear and convincing evidence that such person has violated a condition of his release; and
>
> (2) there is no condition or combination of conditions of release which will reasonably assure that such person will not flee or pose a danger to any other person or the community.

* * *

(c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both.

* * *

9. D.C. Code Ann. § 33-501(15) (1988 Repl.) provides:

(15) "Narcotic drug" means any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, its phenanthrene alkaloids, and their derivatives (except isoquiniline alkaloids of opium);

(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in subparagraph (A) of this paragraph; or

(C) Opium poppy and poppy straw.

10. D.C. Code Ann. § 33-501(15) (1991 Supp.) provides, in pertinent part:

(15) "Narcotic drug" means . . . :

* * *

(D) Cocaine, it[s] salts, optical and geometric isomers, and salts of isomers;

* * *

11. D.C. Code Ann. § 33-541 (1988 Repl.) provides, in pertinent part:

(a)(1) Except as authorized by this chapter, it is unlawful for any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance.

(2) Any person who violates this subsection with respect to:

(A) A controlled substance classified in Schedule I or II which is a narcotic drug, phencyclidine, or a phencyclidine immediate precursor, is guilty of a crime and upon conviction may be imprisoned for not more than 15 years, or fined not more than $100,000 or both.

(B) Any other controlled substance classified in Schedule I, II, or III, except for phencyclidine or a phencyclidine immediate precursor, is guilty of a crime and upon conviction may be imprisoned for not more than 5 years, fined not more than $50,000, or both.

12. D.C. Superior Court Rules Governing Intrafamily Proceedings provide, in pertinent part:

Rule 7. Motions.

(c) *Motion for contempt for violation of protection order.* When a motion for contempt is

filed alleging violation of a civil protection order or temporary protection order, the Intrafamily Clerk shall issue a notice of hearing and order directing appearance. * * * Punishment upon a finding of content shall be limited as provided in [Superior Court Rules] Intrafamily 12(e).

Rule 12. Contempt.

(b) *Violation of protection order.* A motion alleging one or more violations of a temporary protection order or civil protection order shall be filed and served pursuant to Rule 7(c).

(c) *Contempt hearing procedures.*

(1) The respondent has the right to counsel and shall be so advised.

(2) Anytime the judge contemplates imposing a sentence of imprisonment if the contempt is proven beyond a reasonable doubt, the judge may appoint counsel for the respondent. The Court may also request that the Corporation Counsel represent the petitioner.

* * *

(e) Punishment upon finding of contempt by the Division. Contempt may be punished by a fine or penalty of not more than $300.00 or by imprisonment for not more than six (6) months, or both.

Supreme Court, U.S.
FILED
AUG 27 1992
OFFICE OF THE CLERK

(7)

No. 91-1231

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents state that we have "urge[d] the Court to jettison normal double jeopardy principles" in cases involving successive prosecutions for criminal contempt and substantive criminal offenses, Resp. Br. 13; that we have attempted to "establish an exception to double jeopardy law," Resp. Br. 24; and that we

have argued that defendants in criminal contempt cases should be "refus[ed] * * * the protection of the Double Jeopardy Clause," Resp. Br. 25.

Respondents do not accompany any of those assertions with citations to our petition or brief, and their characterizations misconstrue our position. We have not argued that this Court should "jettison" normal double jeopardy principles or that the Double Jeopardy Clause is in some way inapplicable to criminal contempt offenses. On the contrary, we accept the proposition that the Double Jeopardy Clause is applicable to prosecutions for criminal contempt, as it is to any other criminal prosecution. But that is merely the starting point for the real inquiry in this case. As we pointed out in our reply brief at the petition stage, "[t]he question presented in this case is not whether the Double Jeopardy Clause applies to criminal contempt cases, * * * [but] whether criminal contempt is the 'same offense' as the substantive criminal offenses charged." Pet. Rep. Br. 9. We have consistently argued to this Court that criminal contempt is not the same offense as a substantive criminal offense based on the same conduct. See, *e.g.*, Pet. Br. 10, 14, 17, 24, 29, 31, 42, 45. Respondents' lengthy argument (Resp. Br. 10-18) that the Double Jeopardy Clause applies to prosecutions for criminal contempt is thus beside the point.

As a result of respondents' mistaken view of the question presented, their reliance on the summary decisions in *Menna* v. *New York*, 423 U.S. 61 (1975), and *Colombo* v. *New York*, 405 U.S. 9 (1972), is misplaced. See Resp. Br. 19-21. In each of those cases, the defendant was prosecuted in state court for criminal contempt for refusing to testify before a grand jury and then indicted under another criminal

contempt provision of the state criminal code. In both cases, this Court remanded to the state court for further proceedings on the defendants' double jeopardy claims. We agree that a premise of those decisions is that the Double Jeopardy Clause applies to prosecutions for criminal contempt. But neither decision can fairly be read to hold that contempt of court is the "same offense" as a substantive criminal offense whenever the contempt consists of violating a court order and the criminal offense involves the same conduct.

Neither in *Menna* nor in *Colombo* did this Court decide whether the Double Jeopardy Clause barred the prosecutions at issue there. The Court in *Colombo* stated that it was "disinclined at this juncture to entertain and determine the double jeopardy question presented by petitioner," 405 U.S. at 11, while the Court in *Menna* "express[ed] no view" on the merits of the double jeopardy claim, 423 U.S. at 63. Contrary to respondents' contention, *Menna* and *Colombo* did not decide by implication the double jeopardy questions that the Court expressly declined to address.

Even if the Court had decided the merits of the double jeopardy questions presented in *Menna* and *Colombo*, those questions differed substantially from the question presented here. *Menna* and *Colombo* involved successive prosecutions for criminal contempt of court and for another offense that was similar, if not identical, to criminal contempt of court. See *Colombo*, 405 U.S. at 10. Since the Double Jeopardy Clause applies to the offense of criminal contempt, a defendant cannot be prosecuted twice for that offense. In this case, however, respondents were not prosecuted twice for criminal contempt of court. Rather, they were prosecuted for criminal contempt of court

and then for substantive criminal offenses having nothing to do with contempt. Accordingly, even if this Court had determined that the defendants in *Menna* and *Colombo* had been successively prosecuted for criminal contempt, that determination would have had little bearing on the question whether respondents in this case were prosecuted twice for the "same offense." [1]

2. As we explained in our opening brief (at 10-14), the overwhelming weight of authority establishes that a defendant may be successively prosecuted for contempt and for a substantive offense based on the same conduct. This Court's earliest statements to that effect were in *In re Debs*, 158 U.S. 564 (1895), and the Court expressed similar views in *In re Chapman*, 166 U.S. 661 (1897); *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 330 (1904), and *Jurney* v. *MacCracken*, 294 U.S. 125, 151 (1935). The lower federal and state courts have reached the same conclusion, relying on a variety of grounds. See Pet. Br. 12-23.

Respondents attempt to explain away this Court's statements in *Debs* as "dicta." Resp. Br. 19. The statements in *Debs*, however, were not mere casual observations; rather, they reflected the well-recognized legal principle that contempt and a substantive offense based on the same conduct are not the same offense and may be separately prosecuted. The principle stated by the Court in *Debs* was settled at that time and has been recognized in numerous cases since then, as respondents acknowledge. See Resp. Br. 24 (noting that many cases have cited the "established rule" that allows successive prosecutions for criminal contempt and substantive offenses).[2]

Nor can respondents convincingly distinguish *Chapman* and *Jurney* on the ground that those cases concerned contempt of Congress rather than contempt of court. Resp. Br. 19 n.6. Congress's power to punish an individual for contempt arises from the same inherent authority to protect its own proceedings as does a court's contempt power. In *Chapman* and *Jurney*, this Court stated that an individual may be punished separately for contempt of Congress and for a substantive criminal offense based on the same conduct. The same analysis applies to an individual who is prosecuted for contempt of court and then for a substantive offense based on the same conduct.

With respect to lower court authority, respondents err in asserting that, before *Grady* v. *Corbin*, 495 U.S. 508 (1990), there was substantial lower court authority holding that the Double Jeopardy Clause bars successive prosecutions for contempt and for criminal conduct based on the same conduct. In support of that assertion, respondents cite two district

[1] Contrary to respondents' argument, *Menna* and *Colombo* do not differ from this case simply because "the criminal code offense in [*Menna* and *Colombo*] was entitled 'contempt.'" Resp. Br. 21 n.8. It was not the title of the criminal code offense in *Menna* and *Colombo*, but rather its statutory definition, that lent support to the defendants' arguments that they were prosecuted twice for the same offense.

[2] Respondents concede (Resp. Br. 13) that their double jeopardy analysis does not apply to summary contempt proceedings, but they fail to provide any principled basis for concluding that conduct that is subject to summary contempt proceedings is not the "same offense" as a substantive crime based on the same acts, while conduct that is subject to non-summary contempt proceedings constitutes the "same offense" as the related substantive crime for double jeopardy purposes.

court decisions and five state court decisions (Resp. Br. 22-23 & n.9). Of the five state court decisions, respondents acknowledge that two were based on the state law of Oregon, not federal law: *State* v. *McIntyre*, 764 P.2d 972 (Or. Ct. App. 1988), and *State* v. *Thompson*, 659 P.2d 383, 386 (Or. 1983). The remaining three cases were decided by intermediate state appellate courts. See *State* v. *Hope*, 449 So. 2d 633 (La. Ct. App. 1989); *People* v. *Lombardo*, 123 Cal. Rptr. 755, 758 (Cal. Ct. App. 1975); *People* v. *Rodriguez*, 514 N.E.2d 1033 (Ill. App. Ct. 1987), appeal denied, 520 N.E.2d 391 (Ill. 1988).[3] Respondents do not, and cannot, cite a single pre-*Grady* decision of the highest court of a State or a federal court of appeals holding that under the federal Constitution criminal contempt and a substantive offense based on the same conduct are the same offense.

3. Respondents argue that the effect of subjecting them to prosecution on substantive charges after they have been held in contempt is the same as prosecuting them twice for the same offense (Resp. Br. 39-40) and that the effect on the government of requiring it to prosecute them for all offenses at the same time would be minimal (Resp. Br. 15-18).

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[3] In *Rodriguez*, an intermediate appellate court in Illinois held that a defendant could be tried separately for contempt, based on violation of a court order, and for two substantive crimes based on the same conduct, 514 N.E.2d at 1037; the court also held, in full accord with our analysis here, that the defendant could not be tried separately for the same contempt and for another offense that included violation of the court order as an element, *ibid.* The Illinois Supreme Court has made clear that separate prosecutions for contempt and substantive offenses are permissible. *People* v. *Totten*, 514 N.E.2d 959 (Ill. 1987).

The fact that a second prosecution may be burdensome for a defendant is not sufficient, standing alone, to invoke the double jeopardy bar. In any case in which the government introduces evidence of already prosecuted crimes against a defendant under Federal Rule of Evidence 404(b), for example, the defendant may well have to defend himself against similar factual allegations before two juries. Yet, that is not sufficient to bar the second trial. See *Dowling* v. *United States*, 493 U.S. 342 (1990). Similarly, a defendant may be forced to defend against precisely the same charges a second time if his first trial has ended in a hung jury, see, *e.g.*, *Richardson* v. *United States*, 468 U.S. 317, 317-318 (1984); if he has successfully appealed a conviction on grounds other than insufficiency of the evidence, see, *e.g.*, *Tibbs* v. *Florida*, 457 U.S. 31 (1982); or if he has been prosecuted by both state and federal authorities, see, *e.g.*, *Abbate* v. *United States*, 359 U.S. 187, 190-194 (1959). In short, although the burden of multiple prosecutions was one of the reasons the Double Jeopardy Clause was included in the Bill of Rights, the Clause was made applicable only if the separate prosecutions were for "the same offense."

Nor are respondents correct in arguing (Resp. Br. 17) that the only difficulty faced by a prosecutor under the court of appeals' ruling is "essentially a conflict over timing" that could be "solved" either by Congress or by this Court. In the *Dixon* case, the defendant committed a serious felony while he was free on bond pending trial on another offense. The court needed a means to punish Dixon immediately and effectively for violating the terms of his release and to ensure that he would not commit further violations. On respondents' own account (Resp. Br. 3),

the only way to ensure that result was to hold him in criminal contempt. To postpone contempt proceedings and then consolidate the contempt charge with the drug distribution charge would have been futile, since the purpose of the contempt proceeding was to obtain immediate enforcement of the court's order releasing Dixon on bond. That goal could not have been attained had the court waited for an indictment and a criminal trial on the drug distribution charge.[4]

Similarly, amici in the *Foster* case have explained in some detail why a court must have authority to enforce civil protective orders quickly and effectively in order to protect the defendant's spouse from further violence.[5] See Ayuda, etc., Amici Br. 9-14. Respondents argue (Resp. Br. 27-29) that various schemes could be put into effect that would, in respondents' view, provide protection for victims of spousal abuse through the criminal justice system. But the efficacy of such schemes is open to doubt; indeed, as amici point out, the District of Columbia's plan for protecting victims of spousal abuse through civil protective orders was put into place precisely because the criminal justice system provided an inadequate remedy for such victims. Many States have come to the same conclusion. Ayuda, etc., Amici Br. 13.

[4] Although we agree with respondents that criminal contempt defendants are entitled to most of the procedural protections accorded to other criminal defendants, not all requirements applicable to ordinary criminal cases apply to contempt proceedings. For example, the right to an indictment by a grand jury has never been applied to those cited for contempt. See *Green* v. *United States*, 356 U.S. 165, 187 (1958); *United States* v. *Nunn*, 622 F.2d 802 (5th Cir. 1980).

[5] Respondents argue that the United States Attorney's Office did not request a postponement of either Dixon's or Foster's contempt proceedings to enable all charges against each respondent to be brought in one proceeding (Resp. Br. 18), and that such a postponement could have accommodated the needs of the court and the prosecutor (Resp. Br. 16). Respondents neglect the obvious explanation for the refusal to ask for a postponement: it was essential to enforce the order of release in Dixon's case and the civil protective order in Foster's case immediately, before Dixon could commit more offenses while on pretrial release and before Foster could seriously injure—or perhaps kill—his wife.

On a related point, respondents dispute our argument that, if prosecution of a defendant for criminal contempt barred a subsequent prosecution on substantive criminal charges, courts would in effect control the Executive Branch's exercise of its prosecutorial discretion, in violation of constitutional separation of powers concerns. Resp. Br. 15-18. Respondents assert that the referral process outlined by this Court in *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), by which "a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions" before undertaking to appoint a prosecutor itself, 481 U.S. at 801, ensures protection of the Executive Branch's prosecutorial discretion.

Far from supporting respondents' argument, *Young* makes clear that the danger to which we referred would be unavoidable if a court's decision to prosecute a defendant for criminal contempt barred a later prosecution for a substantive criminal offense. This Court made clear in *Young* that, although a federal court should initially request that a federal prosecutor pursue criminal contempt charges, the court is not bound by the prosecutor's decision whether to proceed. This Court stated in *Young* that

a court "should appoint a private prosecutor only if that request is denied." 481 U.S. at 801. That is because "[i]f the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself." *Ibid.* The ultimate teaching of *Young* is that a court retains "its inherent power of self-protection," *ibid.*, and its ultimate control over the decision whether (and when) to prosecute.[6] As we explained in our opening brief (at 20-21), if that control has the effect of precluding the Executive Branch from exercising its prosecutorial discretion, it trenches upon core separation of powers concerns.[7]

In any event, this Court in *Young* was exercising its supervisory powers over the federal courts, and its holding consequently did not bind the state courts. See 481 U.S. at 802.[8] If the judgment below is affirmed, a finding of contempt would bar a prosecution for a substantive criminal offense in state courts as well. Since state courts need not employ the referral procedure outlined in *Young*, that referral procedure would do nothing to remedy the problem caused if, under the Double Jeopardy Clause, a state court's institution of contempt proceedings controls the prosecutor's authority to pursue substantive criminal charges.[9]

4. Respondents argue (Resp. Br. 30-38, 41-44) that the court of appeals' result follows directly from *Grady* v. *Corbin*, *supra*.

As we explained in our opening brief (at 24-32), the *result* in *Grady* marked a modest extension of this Court's precedents in the area, but the *formulation* of the double jeopardy test employed by the Court in *Grady* went substantially beyond any decision that came before it. Respondents' assertion that the court of appeals' result follows from pre-*Grady* authority and from the result in *Grady* is mistaken.

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[6] See also 481 U.S. at 800-801 ("[C]ourts have long had, and must continue to have, the authority to appoint private attorneys to initiate [contempt] proceedings when the need arises.")

[7] The conflict between the court's interest in promptly vindicating its authority and the prosecutor's interest in investigating and prosecuting criminal charges may affect not only the question whether to proceed, but also questions such as whom to charge, what charges to bring, and when to bring them. Even if the prosecutor believes he will ultimately want to prosecute a defendant for conduct related to that at issue in a contempt proceeding, the prosecutor may not know the full scope of the defendant's conduct or the identities of other individuals involved at the time the court wishes to proceed on the contempt citation.

[8] No party in the *Foster* case raised any issue concerning the applicability of *Young* to the District of Columbia courts. As respondents point out, at least one court has held *Young* inapplicable to local court proceedings in the District of Columbia. Resp. Br. 27 n.15. Numerous States permit private prosecutions of contempt. See Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U. L.Q. 85, 103-107 (1992).

[9] Respondents argue (Resp. Br. 14 n.1) that in this case there is no difference between "the duties to which respondents were subjected by the court" and the duty to obey the law, which "preexisted their participation in judicial proceedings." That is not so. The court orders in both cases included directives that were not duties to which respondents were subjected by force of the general criminal law. See J.A. 8 (requiring Dixon to participate in a lineup); Pet. App. 4a (requiring Foster to stay away from his mother-in-law's home and place of work).

a. This Court has routinely applied the *Blockburger* "elements" test, rather than the *Grady* formulation or any variation of it, in successive prosecution cases. See Pet. Br. 36-41. Respondents' efforts to distinguish this Court's cases on the subject are unconvincing.

With respect to *In re Nielsen*, 131 U.S. 176 (1889), respondents assert that our view that *Nielsen* applied the "elements" test "runs counter to the explicit recognition in *Nielsen* that, under the statutory definition of the offenses, adultery and cohabitation [the two offenses at issue in *Nielsen*] were not the same." Resp. Br. 42. Respondents do not cite any portion of the *Nielsen* opinion for that "explicit recognition," and we are aware of none. *Nielsen* repeatedly cited and quoted *Morey* v. *Commonwealth*, 108 Mass. 433, (1871), each time with approval. See 131 U.S. at 187, 188, 190. As we noted in our opening brief (at 38-39), the *Morey* formulation quoted by this Court in *Nielsen* is identical to the formulation later adopted in *Blockburger*. The Court expressly distinguished *Nielsen* on its facts, and not as a matter of law, from *Morey*, see 131 U.S. at 188. And the Court construed the statute against cohabitation to include the elements of adultery, see 131 U.S. at 189, an interpretive effort that would have been unnecessary had the Court intended to adopt or apply anything other than the elements test. Respondents' contention that this Court in *Nielsen* departed from the *Blockburger* test runs squarely into the Court's own explanation of its holding, in which the Court embraced the traditional elements test as the proper device to determine whether two offenses are the same for double jeopardy purposes.

Nor are respondents correct in claiming that the other early cases we cite did not involve a "literal application of the *Blockburger* test." Resp. Br. 42. Respondents concede that *United States* v. *Bayer*, 331 U.S. 532 (1947), was decided "on the basis of the longstanding rule * * * that conspiracy and a substantive offense are separate offenses." Resp. Br. 43 n.23. But that rule followed directly from the proposition that a conspiracy and its underlying substantive offense each requires proof of an element that the other does not. See 331 U.S. at 542. Respondents concede (Resp. Br. 43 n.23) that in *Gavieres* v. *United States*, 220 U.S. 338 (1911), the Court found that the two crimes for which the defendant was prosecuted were not the same because each required proof of a fact that the other did not. That result required a literal application of the *Blockburger* rule. Although respondents sepeculate that *Gavieres* would have come out the same way under *Grady* (Resp. Br. 43 n.23), they provide no basis for that speculation, nor do they claim that the *Gavieres* Court believed it was applying anything other than the traditional elements test. Indeed, in the closing sentence of the opinion the Court expressly embraced the elements test and rejected any reliance on the identity of the conduct that was the subject of the two charges: "While it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other." 220 U.S. at 345.[10]

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[10] Respondents are correct (Resp. Br. 43 n.23) that the Court did not specifically recite the elements test in either *Grafton* v. *United States*, 206 U.S. 333, 349-351 (1907), or *Burton* v. *United States*, 202 U.S. 344, 380-381 (1906). None-

b. None of this Court's recent decisions involving successive prosecutions requires affirmance of the court of appeals' judgment in this case. *Harris* v. *Oklahoma*, 433 U.S. 682 (1977), on which respondents place substantial reliance, provides no support for their argument. *Harris* established that, where the statutory definition of one offense (felony murder) incorporates by generic reference a number of other offenses, the other offenses are properly viewed as lesser included offenses even if the elements of those offenses are not specifically set out in the statute. That principle is of no use to respondents. Notwithstanding respondents' claim to the contrary (Resp. Br. 35 n.19), criminal contempt is not a "ge-

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theless, the Court's discussion in each case makes it clear that the Court regarded the elements of the two offenses—not the particular facts of the crimes—as governing the question whether two charged offenses are the same. In *Grafton*, after analyzing the statutes under which the defendant was tried, 206 U.S. at 342-343, 348-351, the Court concluded that the offenses at issue—homicide and manslaughter—were the same because the two offenses were merely different "degree[s]" of the "identical offense." 206 U.S. at 350. And in *Burton*, the Court quoted a formulation that was an immediate precursor of the *Blockburger* rule (and is contrary to the formulation the Court used in *Grady*): two offenses are not the same "if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*" 202 U.S. at 380 (emphasis in original). In *Gavieres*, which was decided only five years later, the Court quoted that language from *Burton* (as well as the pertinent language from *Grafton*) in support of its application of the elements test. *Gavieres*, 220 U.S. at 343-345. See also *Carter* v. *McClaughry*, 183 U.S. 365, 394-395 (1902) (setting forth the elements test as proper means of determining whether two charges are for the "same offense" within the meaning of the Double Jeopardy Clause).

neric reference" offense, as was the felony murder statute at issue in *Harris*. The definition of contempt of court does not refer to any other offense, either expressly or by implication.

The same point can be made in another way. A defendant cannot commit felony murder without committing some other felony; felony murder accordingly can be viewed as an aggravated form of the underlying felony. By contrast, contempt of court is often committed without violating any other criminal statute, as respondents acknowledge. See Resp. Br. 35 ("a contempt theoretically could be proved without establishing commission of a criminal code offense, and proof of a criminal code offense does not necessarily establish an element of all contempts"). Since contempt of court and substantive criminal offenses address different interests and share no common elements, contempt of court cannot be viewed as an aggravated form of any other criminal offense.

Nor do *Illinois* v. *Vitale*, 447 U.S. 410 (1980), or *Grady* v. *Corbin*, *supra*, require affirmance in this case. *Vitale* involved the question whether a defendant could be tried for involuntary manslaughter after being tried for failing to reduce speed to avoid the automobile collision out of which the manslaughter charge arose. This Court vacated the judgment of the Illinois Supreme Court that the successive prosecutions would violate the Double Jeopardy Clause and remanded for further proceedings. Although the Court commented that the defendant may have a "substantial claim of double jeopardy," 447 U.S. at 421, depending on how the State prosecuted the case, the Court did not resolve that question.

Even the Court's discussion of the unresolved question in *Vitale*—and its subsequent holding in

Grady when that question reached the Court—do not establish the broad principle required for affirmance in this case. It is true, as respondents argue, that failing to reduce speed to avoid an accident (or, as in *Grady*, driving while intoxicated) is not technically a lesser included offense of involuntary manslaughter. A defendant found guilty of involuntary manslaughter has not necessarily driven while intoxicated or failed to reduce speed to avoid an accident. Yet, as the Court viewed *Vitale* and *Grady*, a defendant who is guilty of the lesser offenses of failing to reduce speed to avoid an accident or driving while intoxicated is reasonably viewed as having had the mental state necessary to commit the greater offense of involuntary manslaughter.[11] And the fact that a defendant charged with the lesser offense has the mental state necessary to satisfy the greater offense is reasonably clear without knowing the facts of any particular case. Accordingly, the Court concluded that *Grady*, like *Harris*, involved a situation in which two offenses, though not technically related as greater and lesser included offenses, bore a sufficiently close analogy to that relationship to trigger the double jeopardy bar.

The same cannot be said about this case. A defendant who is held in contempt of court has not necessarily satisfied any element of any other criminal offense, including the drug distribution, threat, and assault offenses at issue here. Nor can it be said that a defendant guilty of those offenses has satisfied any necessary element of criminal contempt. In short, as

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[11] See, *e.g.*, W. LaFave & A. Scott, *Handbook on Criminal Law* 586, 593 (1972) (defining involuntary manslaughter); Model Penal Code § 210.4 (1985) (negligent homicide).

we explained in our opening brief (at 30-32), the offenses for which each respondent was prosecuted are entirely distinct, and the analogy to greater and lesser included offenses on which the Court relied in *Harris*, *Vitale*, and *Grady* is inapt.

5. We believe that the formulation the Court employed in *Grady* to determine when successive prosecutions are barred by the Double Jeopardy Clause is broader than was necessary to decide that case, and that the result in *Grady* does not require affirmance of the judgment below. If the Court concludes that *Grady* requires affirmance here, however, we believe that *Grady* should be reconsidered and overruled, for the reasons given in our opening brief (at 33-46).

Respondents' arguments to the contrary are essentially that *Grady* is consistent with some of the Court's precedents, Resp. Br. 40-45, and that the *Grady* test "is neither complex nor difficult to apply," Resp. Br. 46. We have responded above to respondents' arguments concerning *Grady's* relationship to this Court's traditional double jeopardy jurisprudence, and we submit that a broad reading of *Grady* finds little support in past cases. With respect to the difficulty of applying the *Grady* test, we pointed out in our opening brief (at 41) that this Court in *Felix*, as well as the lower courts, have recognized the difficulties of applying the *Grady* formulation. More importantly, however, a broad reading of *Grady* is inconsistent with the language of the Double Jeopardy Clause and the history of its interpretation. As in *Felix* and in this case, a broad application of *Grady* threatens to bar criminal prosecutions that have long been accepted as legitimate and impair the effective enforcement of the criminal laws. If this Court de-

termines that *Grady* has that effect, *Grady* should be reconsidered.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

AUGUST 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 60018

Supreme Court, U.S.
FILED
JUN 19 1992
OFFICE OF THE CLERK

No. 91-1231

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,
v.
MICHAEL FOSTER,
Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF OF AYUDA, WOMEN'S LEGAL DEFENSE FUND, ARIZONA COALITION AGAINST DOMESTIC VIOLENCE, CALIFORNIA WOMEN'S LAW CENTER, CATHOLIC UNIVERSITY LAW SCHOOL'S FAMILY ABUSE PROJECT, CENTRO DE AMISTAD, CHICANOS FOR LA CAUSA, COLORADO DOMESTIC VIOLENCE COALITION, D.C. COALITION AGAINST DOMESTIC VIOLENCE, FAMILY VIOLENCE PREVENTION FUND, FRIENDLY HOUSE, GEORGE WASHINGTON

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Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984)	10
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PERIODICALS AND PUBLICATIONS

American Medical Association, *Five Issues in American Health* (1991)	8
Att'y General's Task Force on Family Violence, *Final Report* (1984)	9, 14
Angela Browne, *When Battered Women Kill* (1987)	9
Bureau of Justice Statistics, U.S. Dep't of Justice, *Report to the Nation on Crime and Justice: The Data* (1983)	1
District of Columbia Courts, *Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts* (1992)	3, 12, 17
R. Emerson Dobash and Russell Dobash, *Violence Against Wives* (1979)	9
Desmond Ellis, *Post-Separation Woman Abuse: The Contribution of Lawyers as "Barracudas," "Advocates," and "Counsellors"*, 10 Int'l J. L. & Psychiatry 403 (1987)	9
Charles P. Ewing, *Battered Women Who Kill* (1987)	8
Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States* (1990)	9
Peter Finn and Sarah Colson, U.S. Dep't of Justice, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* (1990)	13

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Caroline W. Harlow, U.S. Dep't of Justice, *Female Victims of Violent Crime* (1991)	8
Catherine F. Klein, *Domestic Violence: D.C.'s New Mandatory Arrest Law*, Washington Lawyer 24 (Nov./Dec. 1991)	10
Susan A. MacManus & Nikki R. Van Hightower, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 Pub. Admin. Rev. 269 (May/June 1989)	8
Susan V. McLeer & Rebecca Anwor, *A Study of Battered Women Presenting in an Emergency Department*, 79 Am. J. Pub. Health 65 (1989)	8
Joan Meier, *The 'Right' to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U.L.Q. 85 (1992)	12, 20
National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice* (1990)	14
Note, *Defense Strategies for Battered Women Who Assault Their Mates: State v. Curry*, 4 Harv. Women's L. J. 161 (1981)	25
Leslye E. Orloff, *Manual on Intrafamily Cases for D.C. Superior Court Judges* (1991)	22
Police Foundation, *Domestic Violence and the Police* (1977)	9
Dale H. Robinson, Congressional Research Service, *Report for Congress. Family Violence: Background, Issues, and the State and Federal Response* (1992)	10
United States Commission on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* (1982)	22
Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 Wash. L. Rev. 267 (1985)	14
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Violence Against Women: Victims of the System. Hearings on S. 15 Before the Senate Comm. on the Judiciary, 102d Cong., 1st Sess. 37 (1991) (resolution adopted by the National Association of Attorneys General)	8, 9
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INTERESTS OF AMICI CURIAE

This brief amici curiae is submitted on behalf of numerous interested organizations which provide assistance to victims of domestic violence like Ms. Ana Foster, a battered woman whose attempt to avail herself of civil legal protection was held by the court below to immunize her abuser from criminal prosecution. These organizations include legal service providers, law school clinical programs, women's legal advocacy organizations, domestic violence shelters, and state and national domestic violence coalitions. All amici have substantial knowledge of the problem of domestic violence and the procedures for combatting it in the District of Columbia and nationwide. Amici are gravely concerned that the decision of the D.C. Court of Appeals, if sustained, will deal a fatal blow to the effectiveness of remedial schemes in the District of Columbia and nationally, and thereby hinder society's efforts to protect battered women from abuse.[1] A statement of the interest of each amicus is included as Appendix A.[2]

STATEMENT OF THE CASE

Shortly after Ana Foster married Michael Foster [hereinafter Respondent] in March 1987, Ms. Foster became the victim of serious physical and emotional abuse at the hands of her husband. Respondent repeatedly assaulted, threatened and harassed Ms. Foster. Respondent's violence included choking Ms. Foster, twice throwing her to the floor, putting his fist through the wall, and refusing to allow her to leave the house. Respondent threatened to kill Ms. Foster on several occasions, telling

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[1] This brief refers to domestic violence victims as women (although it acknowledges that there are male victims) because ninety-five percent of adult victims of domestic violence are women. Bureau of Justice Statistics, U.S. Dep't of Justice, *Report to the Nation on Crime and Justice: The Data* 21 (1983).

[2] Pursuant to Sup. Ct. R. 37.3, the parties' letters of consent to the filing of this brief have been filed with the clerk.

her that he had purchased a Magnum 45 revolver and that he would "blow [her] brains out." [3]

After months of abuse, Ms. Foster applied for and obtained emergency protection under the District of Columbia's civil statutory scheme for addressing domestic violence, the Intrafamily Offenses Act. D.C. Code Ann. §§ 16-1001 to -1005 (1989). The Family Division of the D.C. Superior Court issued a Temporary Civil Protection Order, finding that Respondent presented an "immediate danger to the welfare or safety of a family member." [4] In August 1987, this order was converted to a Civil Protection Order of one-year duration requiring that Respondent "not molest, assault, or in any manner threaten or physically abuse" Ms. Foster.[5]

Despite the court order, Respondent continued his pattern of physical violence, intimidation and threats against Ms. Foster. Respondent's abuse included threats such as "I'm going to beat your ass," and, "Tomorrow, when you leave the house, be careful." (Joint Appendix 23) [hereinafter J.A.]. On one occasion, Respondent followed Ms. Foster from her workplace, grabbed her, and threw her against a parked car. She hit the car with such force that she lost consciousness. She also sustained contusions on her forehead, a gash on her upper lip, and a loosened upper tooth, and was rushed by ambulance to the hospital (J.A. 24). On another occasion, Respondent threw Ms. Foster down a flight of stairs, kicking her as she fell, and slamming her head into the floor, causing her to lose consciousness. (J.A. 28).

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[3] See Petition and Affidavit for Civil Protection Order, *Ana V. Foster v. Michael Foster*, (IF. No. 630-87) (D.C. Super. Ct. filed July 29, 1987), which is lodged with the Court [hereinafter Pet. & Aff. for Civ. Prot. Order].

[4] See Temporary Civil Protection Order, *Ana V. Foster v. Michael Foster*, (IF. No. 630-87) (D.C. Super. Ct. signed July 29, 1987), which is lodged with the Court.

[5] *United States v. Dixon*, 598 A.2d 724, 725-26 (D.C. 1991).

On September 22 and November 19, 1987, and on May 24, 1988, Ms. Foster filed Motions to Adjudicate Contempt of the Civil Protection Order. For a lengthy period, while the abuse continued, Ms. Foster was not able to accomplish personal service on Respondent as required by the Intrafamily Court Rules.[6] In August 1988, after service was completed, the Family Division of the D.C. Superior Court held a hearing on the contempt motions.[7] Ms. Foster was represented by a *pro bono* attorney from the public interest organization AYUDA, and Respondent was provided with court-appointed counsel. The United States Attorney did not participate in any way. After an evidentiary hearing, the court made findings of contempt with respect to four incidents, and found that Ms. Foster failed to sustain her burden of proof with respect to several other incidents. It then sentenced Respondent to consecutive sentences of 150 days of imprisonment for each of the four incidents of contempt.[8]

Ten months after Ms. Foster filed her first contempt motion, but just prior to the contempt hearing, the U.S. Attorney for the District of Columbia charged Respondent with assault with intent to kill while armed based on

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[6] The Intrafamily Rules require personal service by a person who is not a party to and is not otherwise interested in the action. Superior Court of D.C.-Intrafamily Rule 3(b), 7(c) [hereinafter D.C. Ct. IF. R.]. The Intrafamily Rules are included as Appendix B.

[7] While it took Ms. Foster almost one year for her motions to be heard because of service of process problems, usually a hearing occurs about one month after the motion is filed.

[8] *Dixon*, 598 A.2d at 725. Respondent's consecutive sentences were atypical. Usually contempt sentences are significantly shorter than the statutory maximum of 180 days imprisonment and/or a $300 fine, as set out in D.C. Ct. IF. R. 12(e). Most jail sentences are suspended, or execution is stayed. District of Columbia Courts, *Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts* 152 (1992) [hereinafter *D.C. Court Report*].

one of his attacks on Ms. Foster.[9] Six months later, a grand jury returned a five-count indictment charging him with assault, threats, and assault with intent to kill, based on two assaults for which he had been found in contempt and three threats for which he had not. (J.A. 43-44). Respondent moved to dismiss the indictment on double jeopardy grounds, but the D.C. Superior Court Criminal Division held that the criminal offenses before it differed from the contempt motions brought in the Family Division. *United States v. Foster*, No. F. 8415-88, Pet. App. 23a (D.C. Super. Ct. Apr. 13, 1989). The court also analyzed the legislative history of the Intrafamily Offenses Act and found,

> clearly an intent by the legislature to allow two different remedies for violation of Civil Protection Orders[:] One for contempt after wilful violation of the order to protect the petitioner and the ability of the Court to enforce its orders and additional proceedings in the Criminal Division to protect the community.

Id. at Pet. App. 24a.

Respondent appealed the denial of his motion to dismiss the indictment, reiterating his double jeopardy claims. After oral argument before a panel of the District of Columbia Court of Appeals, the court *sua sponte* consolidated the case with another pending case, *United States v. Dixon*. The court of appeals then heard reargument *en banc*, and issued the decision on review before this Court.

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals held that a battered woman's contempt motion to enforce her civil protection order barred the United States Attorney from prosecuting the respondent for statutory criminal offenses which stemmed from the same incident. In so holding, the court adopted a novel theory of double jeopardy

[9] *Dixon*, 598 A.2d at 727.

which for the first time extended the protection of the Double Jeopardy Clause to the system of privately maintained civil proceedings. That extension of double jeopardy protection takes the Clause far beyond its purpose and its scope as defined by the cases of this Court.

The D.C. Intrafamily Offenses Act reflects a well-conceived legislative judgment that the problem of domestic violence requires that victims of such violence have access to a particular form of relief: the equity powers of the family court. The relief available from that court would be rendered ineffectual if that court could not issue orders which were enforceable by victims of violence as necessity dictates. At the same time, the Act expressly recognizes that the rights of the victim to pursue her individual remedies should not limit or affect the prerogative of the State to vindicate the rights of the community at large through the enforcement of the criminal laws. Just as it is vital that the victim of domestic violence have an effective remedy at her disposal, it is necessary that the State have the power to demonstrate its disapproval of domestic violence through criminal prosecution. If sustained by this Court, the decision below—which allows the actions of a private party to immunize persons in the position of Respondent from criminal prosecution—would destroy a carefully conceived legislative strategy for dealing with a problem of enormous proportions, the problem of domestic violence.

"The protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v. Halper*, 490 U.S. 435 (1989). This is clear even where the private litigation involves the kind of punishment that, if sought by the government, would undoubtedly give rise to double jeopardy concerns. This Court has neither held nor implied that a motion to enforce a civil judgment between private parties would bar a subsequent criminal action arising from the same incident.

The principle that the Double Jeopardy Clause has no application to proceedings between private parties reflects the basic purposes of the constitutional prohibition. The Clause was designed to prevent the State, with "all its resources and power," *Green v. United States*, 355 U.S. 184, 187-88 (1957), from prosecuting a defendant twice for the same offense. Abuse of prosecutorial power is the core concern of the Double Jeopardy Clause, and the law of double jeopardy has been shaped by this Court to reflect that concern.

Ms. Foster's contempt motion presented no risk of prosecutorial overreaching. Unlike the U.S. Attorney on the criminal side, the victim of domestic violence, invoking her rights under the Act, does not command the resources and power of the State's criminal prosecutor. She has no access to police investigators, police files, or search warrants to support her investigation. She may not enlist the grand jury, with its subpoena power, to aid her investigation. She has no power to arrest or detain the respondent upon the filing of her motion. Indeed, under the D.C. Intrafamily Offenses Act, she is not even provided with the ordinary discovery rights of a civil litigant. The respondent, in contrast, is afforded broad due process procedural protections, including a court-appointed attorney if indigent, while his victim usually appears *pro se*.

Moreover, unlike the U.S. Attorney, a battered woman appears in court as someone who deeply fears that her safety and life will not be protected. She knows that her last court appearance, in which she obtained an order for her protection, did not end the violence against her. To liken her situation, and her motion to enforce the order entered for her protection, to the actions of the State as prosecutor is to trivialize the important function of the Double Jeopardy Clause.

The court below proceeded as if the defendant's interest was the only interest to be considered in addressing

the scope of double jeopardy protection. Under this Court's cases, however, a defendant's interest in finality has never been sufficient to bar a prosecution absent the risk of prosecutorial overreaching. The defendant's interest in finality cannot negate or override society's interest in eliminating domestic violence (which the legislature correctly determined requires a two-track, criminal and civil, legal approach), the State's right to one "full and fair opportunity" to obtain a criminal conviction, or a victim's right to employ available legal processes in an effort to save her own life.

If the Court finds that the Double Jeopardy Clause does apply to a private litigant's motion for contempt in a civil case, the proper test for determining whether both cases involve the "same offense" is that set forth in *Blockburger v. U.S.*, 284 U.S. 299 (1932). Under the *Blockburger* test, which focuses on the statutory elements of each offense in order to determine whether, as a matter of commonsense, both should be regarded as the "same," the violation of a court order is clearly not the "same offense" as assault with intent to kill, assault, or threats. The broader standard for judging the "same offense" applied in *Grady v. Corbin*, 495 U.S. 508 (1990), is simply inapplicable to this case, for that standard is triggered only where the successive prosecutions raise a concern about prosecutorial overreaching—the very concern which is absent in this case.

At issue in this case is a carefully conceived legislative approach to assist domestic violence victims. If the judgment in *Foster* is affirmed, the result will be the destruction of that approach, with the certain consequence of greater injury and loss of life. As shown below, the Double Jeopardy Clause and this Court's precedents neither require nor permit that result.

ARGUMENT

I. THE DECISION BELOW UNDERMINES THE DISTRICT OF COLUMBIA'S INTRAFAMILY OFFENSES ACT WHICH PROVIDES AN IMPORTANT REMEDY TO VICTIMS OF DOMESTIC VIOLENCE.

A. The Problem Of Domestic Violence In America Is One of Crisis Proportions.

Domestic violence is a social problem of extraordinary proportions. National estimates on the number of domestic violence victims vary from 626,000 a year [10] to four million a year.[11] Battering "is the single largest cause of injury to women," [12] resulting in one-fifth of women's hospital emergency room visits,[13] at a cost of $44 million in medical expenses each year.[14] Battering may involve extremely severe violence, including punching, kicking, and attacks with knives, guns, and broken bottles. Injuries include lacerations, fractures, dislocations, unconsciousness, internal bleeding and death.[15]

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[10] Caroline W. Harlow, U.S. Dep't of Justice, *Female Victims of Violent Crime* 1 (1991).

[11] *Violence Against Women: Victims of the System. Hearings on S. 15 Before the Senate Comm. on Judiciary*, 102d Cong., 1st Sess. 37 (1991) (resolution adopted by the National Association of Attorneys General) [hereinafter *Senate Judiciary's Violence Against Women Hearings*].

[12] American Medical Association, *Five Issues in American Health* 5 (1991).

[13] Susan A. MacManus & Nikki R. Van Hightower, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 Pub. Admin. Rev. 269 (May/June 1989).

[14] Susan V. McLeer & Rebecca Anwor, *A Study of Battered Women Presenting in an Emergency Department*, 79 Am. J. Pub. Health 65 (1989).

[15] Charles P. Ewing, *Battered Women Who Kill* 8 (1987) (reviewing several studies).

Domestic violence usually escalates in frequency and severity over time.[16] Nearly one-third of all female murder victims are killed by their husbands or boyfriends,[17] often as the culmination of a history of domestic violence.[18] Violence within an intimate relationship is especially difficult for victims to avoid: women face the greatest risk of violence when trying to escape from their batterers.[19]

The tragedy for battered women does not reflect the hidden psychological injury that the 3.3 million children who live in households with domestic violence experience each year.[20] According to the Attorney General's Task Force on Family Violence, "[c]hildren . . . who live in homes where parents are battered carry the terrible lessons of violence with them into adulthood . . . . [T]o tolerate family violence is to allow the seeds of violence to be sown into the next generation." [21]

B. The Criminal Justice System Alone Cannot Ensure Victims' Safety

The criminal justice system by itself has proven sadly ineffective in responding to the problem of domestic violence. Police have treated intrafamily violence less seri-

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[16] R. Emerson Dobash and Russell Dobash, *Violence Against Wives* 124 (1979).

[17] Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States* 13 (1990).

[18] Police Foundation, *Domestic Violence and the Police* iv (1977).

[19] Angela Browne, *When Battered Women Kill* 110-22 (1987). If a man does not expect to be punished for his violent conduct, the likelihood of post-separation violence is highest. Desmond Ellis, *Post-Separation Woman Abuse: The Contribution of Lawyers as "Barracudas," "Advocates," and "Counsellors"*, 10 Int'l J. L. & Psychiatry 403, 408 (1987).

[20] *Senate Judiciary's Violence Against Women Hearings* at 37.

[21] Atty's General's Task Force on Family Violence, *Final Report* iii (1984) [hereinafter *Att'y Gen. Report*].

ously than other crimes,[22] and criminal prosecutions are very rare.[23] Moreover, even when the criminal justice system responds, its delays have a profound impact on victims, who typically experience additional violence while waiting for the system to work.

The facts in Ms. Foster's case illustrate the delay and unresponsiveness of the criminal justice system. The U.S. Attorney filed five criminal charges against Respondent for the incidents that led Ms. Foster *initially* to petition for civil protection on July 29, 1987, but not one of those charges was prosecuted.[24] Even though the grand jury eventually returned an indictment for some of the violence underlying the contempt motions, the grand jury action did not take place until January 19, 1989—almost eight months after the *last* incident.[25] Respondent's motion to dismiss was not resolved by the trial court until April 7, 1989, more than two years after the pattern of abuse began.[26]

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[22] *See, e.g., Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir.), *amended by* 901 F.2d 969 (1988); *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984); *Bruno v. Codd*, 393 N.E. 2d 976, 980 (N.Y.), *appeal denied*, 48 N.Y.2d 656 (1979).

[23] "Law enforcement personnel have been reluctant to prosecute domestic violence cases, which many consider to be private matters between spouses and thus inappropriate for government intervention." Dale H. Robinson, Congressional Research Service, *Report for Congress. Family Violence: Background, Issues, and the State and Federal Response* 22 (1992). *See also* Catherine F. Klein, *Domestic Violence: D.C.'s New Mandatory Arrest Law*, Washington Lawyer 24 (Nov./Dec. 1991).

[24] *See* Superior Court of D.C., Criminal Information System, Summary by PDID for Michael Foster (June 4, 1992) (lodged with Court); Pet. & Aff. for Civ. Prot. Order.

[25] *See Dixon*, 598 A.2d at 727; J.A. 28.

[26] *See* Pet. & Aff. for Civ. Prot. Order (describing onset of abuse).

C. The Intrafamily Offenses Act Is An Important Legal Remedy For Victims Of Domestic Violence

The inadequacy of the criminal justice system's response led Congress to pass the D.C. Intrafamily Offenses Act in 1970.[27] The Act authorizes the courts to issue civil injunctions against familial violence and to enforce the orders by holding respondents in contempt for violations of them. Proceedings under the Act were expressly intended to "coexist legally along side criminal prosecutions against the same person."[28]

Four aspects of the Act deserve particular attention. First, the scheme is civil and remedial. Before passage of the Act, the legislature reported that criminal offenses between family members were "often left unresolved or otherwise [fell] within the jurisdiction of the criminal court, both being unsatisfactory solutions."[29] As the D.C. Court of Appeals has recognized, the Act "provides for the civil treatment of intra-family offenses, and thus gives the court 'a wider range of dispositional powers than criminal courts to effect rehabilitation rather than retribution. . . .'"[30]

Second, the vast majority of individuals who proceed under the Act appear *pro se*, which was expressly intended when the legislature amended the statute in 1982

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[27] D.C. Court Reform and Criminal Procedure Act. ch. 10, 84 Stat. 473, 546 (1970) (*codified as amended* at D.C. Code Ann. §§ 16-1001 to -1005 (1989)).

[28] *Intrafamily Offenses Amendment Act of 1982: Hearings on Bill 4-195 Before Members of the Council of the District of Columbia* 3 (1982) (report of Committee on the Judiciary) [hereinafter *D.C. Comm. Report*].

[29] H.R. Rep. No. 907, 91st Cong., 2d Sess. 60 (1970).

[30] *Cruz v. Foster*, 597 A.2d 927, 929 (D.C. 1991) (citation omitted). Examples of such remedial options include ordering child custody, visitation, and child support, so that the parties can live apart without violence, and court-mandated counseling for batterers. D.C. Code Ann. § 16-1005(c)(2), (6), (7), (10).

to authorize private rights of action.[31] To facilitate *pro se* access to the system, simple forms exist for both Civil Protection Order Petitions and Motions for Contempt, and no filing fee is charged for either. In the District, sixty-six percent of battered women file for Civil Protection Orders *pro se*, and seventy-five percent bring their Motions for Contempt *pro se*.[32]

Third, the Act provides for private enforcement of the civil injunctive orders by motion for contempt.[33] "[I]t was the intention of the Council that the provi-

[31] *See* D.C. Code Ann. § 16-1003(a); *D.C. Comm. Report* at 108.

[32] *D.C. Court Report* at 143, 153.

[33] D.C. Code Ann. § 16-1005(f). *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787 (1987), involving an exercise of this Court's supervisory power over the federal courts, has no application to this case. There has been no claim of disqualification of the "private prosecutor" in this case; indeed, only the government's criminal prosecution is before this Court, and not the contempt motions filed by Ms. Foster. Moreover, this Court's supervisory power does not govern the D.C. courts, which are comparable to state courts. *Jaycees v. Superior Court*, 491 F. Supp. 579, 581-582 (D.D.C. 1980). The District of Columbia courts have considered *Vuitton* in relation to contempt proceedings in domestic violence cases and have rejected *Vuitton's* applicability. *Castellanos v. Novoa*, 127 Daily Wash. L. Rptr. 1192, 1193-1194 (D.C. Super. Ct. July 9, 1987).

In *Vuitton*, the private party stood to gain $750,000 liquidated damages for violation of the injunction, and the Court was concerned with prosecutors who " 'have available a terrible array of coercive methods to obtain information,' such as 'police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power,' " *Vuitton*, 481 U.S. at 811 (quoting C. Wolfram, *Modern Legal Ethics* 460 (1986)) (plurality part). Unlike the private prosecutor in *Vuitton*, Ms. Foster was not appointed as counsel by the Court under Federal Rule of Criminal Procedure 42, she had no prosecutorial powers (indeed, her discovery rights were inferior to those of most civil litigants), *see infra* pages 20-21, and her interest was saving her own life. *See* Joan Meier, *The 'Right' to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U.L.Q. 85 (1982).

sions of civil protection orders be enforceable by privately filed contempt motions." [34] The D.C. City Council acted in recognition of the importance of privately-initiated contempt motions to a workable remedial scheme. Witnesses before the Council testified that, "the same problems of administrative delay and dependence on prosecutorial discretion that limit a complainant's ability to petition for a CPO [Civil Protection Order] also limit her ability to have that CPO enforced." [35]

Fourth, the legislature appreciated, and expressly stated, that contempt motions filed in civil actions in the Family Division must be in addition to criminal prosecution in the Criminal Division by the U.S. Attorney for the criminal offense: "The institution of criminal charges by the United States Attorney shall be *in addition to*, and shall not affect the rights of the complainant to seek any other relief under this chapter." [36]

While D.C. was one of the first jurisdictions to adopt a civil remedial scheme for domestic violence victims, as of 1990 forty-eight states had legislation allowing a petitioner to apply for a civil protection order; and in thirty states, the victim may file *pro se*.[37] Forty-one states provide for enforcement of protection orders through motions for contempt, an indispensable remedy if the underlying order is to have meaning.[38]

[34] *Castellanos*, 127 Daily Wash. L. Rptr. at 1194.

[35] *IntraFamily Offenses Amendment Act of 1981: Hearings on Bill 4-195 Before a Public Roundtable of the Judiciary Committee of the D.C. City Council* 28 (1981) (statement on behalf of the Women's Legal Defense Fund).

[36] D.C. Ann. Code § 16-1002(c) (emphasis added). *See also D.C. Comm. Report* at 4.

[37] Peter Finn and Sarah Colson, U.S. Dep't of Justice, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* 8-9 (1990).

[38] *Id.* at 50-51. *See, e.g.*, Miss Code Ann. § 93.21.21 (Supp. 1991); 23 Pa. Cons. Stat. Ann. § 6114 (1991).

D. The Separate And Independent Civil And Criminal Legal Responses Are Both Necessary To End Domestic Violence.

The National Council for Juvenile and Family Court Judges,[39] the Attorney General's Task Force on Family Violence,[40] legal scholars,[41] and the District of Columbia's legislature, all recognize that the combination of both civil and criminal approaches is vital to stop domestic violence.

> Requiring victims to choose between civil and criminal processes deprives them and the state the ability to fully protect victims. . . . The denial of criminal prosecution reinforces the rationalization of abusers that family violence does not constitute a crime, and worse, is the fault of the victim. The denial of civil processes leaves victims extremely vulnerable while awaiting trial.[42]

The decision below undermines an important structure for ending domestic violence. That decision allows a respondent to escape punishment under the criminal law because his victim turns to a civil court to enforce her civil injunction against persona! violence. The decision below sabotages the systems adopted by legislatures nationally to fight domestic violence, thereby guaranteeing the perpetuation of such violence intergenerationally.

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[39] National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice* 19 (1990).

[40] *Att'y Gen. Report* at 10.

[41] *See, e.g.*, Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 Wash. L. Rev. 267, 303-04 (1985).

[42] National Council of Juvenile and Family Court Judges, *supra*, at 10.

II. JEOPARDY DOES NOT ATTACH WHEN A BATTERED WOMAN ENFORCES HER CIVIL PROTECTION ORDER WITHOUT THE INVOLVEMENT OF THE STATE'S CRIMINAL PROSECUTOR.

This Court has never held that the Double Jeopardy Clause bars a criminal action by the State arising out of the same conduct that underlies a civil action between private litigants. Those two systems, one of private remedies and the other of state criminal actions, serve different functions. This Court has never even implied that a contempt motion to enforce a civil judgment entered by a court of equity would bar a subsequent criminal action arising from the same incident.[43]

As this Court said very recently, "The protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v. Halper*, 490 U.S. 435 (1989). *Halper* held that because the Government brought both actions, the Double Jeopardy Clause barred the Government from suing Halper civilly for a non-remedial award after it had already prosecuted him criminally. However, when a government prosecution follows a private suit--even a private suit in which punishment was unmistakably imposed—or where the private suit follows the government prosecution, *id.* at 451, no double jeopardy issue arises.

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[43] In the cases where this Court has indicated that a criminal contempt finding might bar a subsequent criminal prosecution, the contempt motion did not arise in the context of private litigation. *See Menna v. New York*, 423 U.S. 61 (1975) (contempt based on defendant's refusal to answer questions before the grand jury); *Colombo v. New York*, 405 U.S. 9 (1972) (same). The two district court cases holding that a contempt adjudication will bar separate prosecution for a substantive criminal offense have involved not only the government as *prosecutor* in each of the successive proceedings, but also the government as the party in interest in the underlying civil action giving rise to the contempt. *See United States v. Haggerty*, 528 F. Supp. 1286, 1295-98 (D. Colo. 1981); *United States v. United States Gypsum Co.*, 404 F. Supp. 619 (D.D.C. 1975).

In *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989), this Court elaborated on the constitutional significance of the government *qua* prosecutor in addressing whether the Eighth Amendment's Excessive Fines Clause applied to a private civil action in which punitive damages were awarded. Again the Court focused on *who* was pursuing the action, and held that the Excessive Fines Clause does not apply to "a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Id.* at 264. Because the central purpose of the Excessive Fines Clause, like the Double Jeopardy Clause, is to limit the "ability of the sovereign to use its prosecutorial power," *id.* at 267, the Court found the constitutional provision "'clearly inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery.'" *Id.* at 272 (citing *Halper*, 490 U.S. 435).[44] The result was dictated, in part, by "the nature of our constitutional framework," which "places limits on the steps a government may take against an individual. . . ." *Id.* at 275.[45]

[44] While the Court noted that the private action for punitive damages indirectly "advance[s] the interests of punishment and deterrence, which are also among the interests advanced by criminal law," and is imposed through "the aegis of the courts and serve[s] to advance governmental interests," *Browning-Ferris*, 490 U.S. at 275, the Court treated as decisive the absence of the government's participation as prosecutor.

[45] In *Halper*, 490 U.S. at 447, this Court made it clear that the denomination of the proceeding as "civil" or "criminal" was not relevant to the double jeopardy question. *See also Browning-Ferris*, 492 U.S. at 263-64. Thus, the court below erred when it found the label "criminal" (attached to the contempt proceeding for purposes of a due process analysis) dispositive of the double jeopardy question. *Dixon*, 598 A.2d at 732 (citing *Bloom v. Illinois*, 391 U.S. 194 (1968)). Moreover, whether procedural due process protection is required does not determine whether double jeopardy attaches to a proceeding. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 764 (1981) (significant procedural due process necessary in termination of parental rights proceeding although no jeopardy attaches). Finally,

As a matter of basic constitutional principle, the Double Jeopardy Clause should not have been applied to the adjudication of Respondent's contempt as it did not involve a state criminal prosecutor. The legislature intended that these motions exist within civil proceedings instituted by the victim, alongside criminal prosecution for the criminal offense. The contempt motions here indeed were instituted, entitled, and tried as part of a civil action, in which Ms. Foster was both the nominal and actual party. She was the complainant in charge, and it was at all times her decision that the litigation move forward. The enforcement of the order was for her benefit, to end the violence she suffered. Throughout she proceeded in her own right in an equity cause, not as a representative of the U.S. Attorney prosecuting a crime. The state prosecutor (here the U.S. Attorney) was not a party and was not represented at the August 1988 hearing. The fact that the contempt motion was brought by a private party in a civil proceeding is determinative of the double jeopardy question.[46]

In seeking to expand the scope of double jeopardy protection to a contempt motion brought by a private citizen, the court below adopted an approach to the Double Jeop-

the contempt proceeding in *Bloom* differs from the one here, as there it was the State's Attorney who initiated the contempt proceeding. 391 U.S. at 210.

[46] The result would not be different if D.C.'s Corporation Counsel, acting for the victim *parens patriae*, brought the motion. Corporation Counsel, while authorized by the Intrafamily Offenses Act to file either a Petition for a Civil Protection Order or a Motion for Contempt, only represents the private petitioner and not the public interest (*see* D.C. Code Ann. §§ 16-1001(1) ("'complainant' means an individual who files or *for whom is filed* a petition. . . .") (emphasis added), 16-1003(a); D.C. Ct. IF. R. 9(a)(2), 12(c)(2)), and has the same limited rights as the victim. *See infra* page 21. The scenario where Corporation Counsel proceeds *parens patriae* on behalf of the victim is not presented in this case. Corporation Counsel did not represent Ms. Foster. In fact, Corporation Counsel files very few contempt motions: approximately nine per year. *D.C. Court Report*, at 153, H-1-12.

ardy Clause that focused exclusively on the interests of the defendant. *Dixon*, 598 A.2d at 732. While acknowledging that the "cases speak in terms of the state or the sovereign as the prosecuting authority," the court simply declared, without explanation or support, that "their emphasis is plainly . . . on the impact of the trial on the defendant." *Id.*

This Court has never focused exclusively on the impact of the trial on the defendant. (See discussion under Section III.B.) Moreover, if adopted by this Court, the lower court's exclusive focus on "defendant impact" would require that a private punitive damages action bar a subsequent criminal prosecution, or even a subsequent private action for punitive damages, a result wholly at odds with *Halper*. It would also require a reevaluation of the long-established "dual sovereignty" doctrine, under which neither successive state and federal prosecutions for the same conduct,[47] nor successive prosecutions by two states for the same conduct,[48] violate the Double Jeopardy Clause, despite the obvious impact of the two prosecutions on the defendant.

Finally, the requirement of a governmental criminal prosecutor to trigger the Double Jeopardy Clause is in no way diminished by this Court's decision in *Grady v. Corbin*, 495 U.S. 508 (1990).[49] *Grady* did not involve a

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[47] *Cross v. North Carolina*, 132 U.S. 131, 139 (1889); *Bartkus v. Illinois*, 359 U.S. 121 (1959). *Cf. United States v. Wheeler*, 435 U.S. 313, 328 (1978) (Navajo Tribe is an independent sovereign from the Federal Government for purposes of the dual sovereignty doctrine).

[48] *Heath v. Alabama*, 474 U.S. 82 (1985).

[49] This was the court's ruling in *Ex parte Williams*, 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc), a case which is virtually identical to *Foster*. There the court dismissed defendant's double jeopardy claim because of the absence of the State as prosectuor on the contempt motion. The D.C. Court of Appeals criticized *Williams* for not discussing *Grady*. 578 A.2d at 731-32. In fact,

private litigant enforcing her civil injunction; in fact, *Grady* contains repeated references to the State's potential to abuse its prosecutorial authority.[50] In addition, this Court recently indicated that *Grady's* broad language was not intended to overrule "long established precedent" defining the reach of the Double Jeopardy Clause in particular settings. *United States v. Felix*, 112 S. Ct. 1377, 1383 (1992). Just as nothing in *Grady* supplanted the well-estabished principle that a substantive crime and a conspiracy to commit that crime are not the same offense for double jeopardy purposes, *id.* at 1384, nothing in *Grady* was meant to upset the settled rule that jeopardy does not attach to a proceeding in which the State has not acted as prosecutor.[51]

III. THE PURPOSES UNDERLYING THE DOUBLE JEOPARDY CLAUSE DO NOT WARRANT ITS EXTENSION TO A BATTERED WOMAN'S ENFORCEMENT OF HER CIVIL PROTECTION ORDER.

A. No Risk Of Prosecutorial Overreaching Arises When A Battered Woman Files A Contempt Motion Under The Intrafamily Offenses Act.

The Double Jeopardy Clause protects against the abuse of prosecutorial authority by the State, with "all its resources and power." *Grady*, 495 U.S. at 518 (quoting

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however, *Williams* cited *Grady*, but clearly found it inapplicable because of the decisive issue before it: the absence of the State's criminal prosecutor.

[50] *Grady*, 495 U.S. at 518-24 (*see, e.g.*, "Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof. . . ." *id.* at 518; "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct," *id.* at 521.).

[51] *See Hansen v. Johns-Manville Prod. Corp.*, 734 F.2d 1036, 1042 (5th Cir. 1984) ("We have uncovered no cases . . . in which a court has afforded double jeopardy protection as to any proceeding that was not initiated by the state."). *But see Burge v. Commonwealth*, 1992 WL 57138 (Ky. Ct. App. Mar. 27, 1992).

Green v. United States, 355 U.S. 184, 187-88 (1957)). *See also United States v. Scott*, 437 U.S. 82, 87 (1978); *Breed v. Jones*, 421 U.S. 519, 529-30 (1975). Only when the government—indeed the same sovereign—is a party to *both* of the proceedings involved are the concerns underlying the Double Jeopardy Clause raised.

A victim's enforcement of her civil protection order in the Superior Court's Family Division, and the U.S. Attorney's prosecution of the respondent's crimes in the Superior Court's Criminal Division, are pursued by completely separate entities.[52] Like two states, or a state and a federal prosecutor, contempt litigators and criminal prosecutors seek to further different interests. A battered woman seeks to enforce her private order to end the violence against her. In contrast, the criminal prosecutor is vindicating *society's* interest in enforcing its criminal law. The two interests are not the same, and to consider the contempt litigator and the criminal prosecutor as one and the same would be to adopt an absurd fiction.

Moreover, in no sense can a private party's contempt motion under the Intrafamily Offenses Act be equated with a criminal prosecution in which the State may bring to bear "all its resources and power" against the respondent.[53] Indeed, contempt proceedings in the Family Division are structured so as to place the respondent in the advantaged position at the hearing, and to limit the power of the petitioner. A respondent to an Intrafamily contempt motion in the Family Division is guaranteed an attorney provided by the District if he is indigent;[54] in fact, Respondent received one here. Indeed, the respond-

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[52] Corporation Counsel, which represents a victim *parens patriae*, is also a separate entity from the U.S. Attorney.

[53] *See* Meier, *supra*, at 89, 99 & n.70.

[54] *Cloutterbuck v. Cloutterbuck*, 556 A.2d 1082, 1084 (D.C. 1989); *cf.* D.C. Ct. IF. R. 12(c)(2).

ent in the contempt proceedings enjoys broad due process protections.[55] In contrast, the petitioner has no right to a state-paid attorney and usually appears *pro se*.

The Intrafamily Rules also circumscribe a battered woman's investigatory power, even more than in an ordinary civil proceeding.[56] Discovery is only available upon motion.[57] Most parties do not seek discovery, nor is it routinely awarded upon request.[58] Even if granted, the scope is sharply limited.[59] Moreover, the victim cannot arrest the respondent, nor can she incarcerate him pending the adjudication of her motion even if he poses a danger to her in the interim.[60] Thus, after Ms. Foster filed her initial contempt motion on September 22, 1987, she was subject to severe violence by Respondent while he remained free.

In short, the battered woman usually must litigate her contempt motion without an attorney, without normal discovery tools, without a grand jury to help her obtain evidence, without search warrants to support her investigation, and without the power of the police behind her. There is simply no sense in which the State brings its prosecutorial power and resources to bear against a respondent when a battered woman files her motion.

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[55] *See* D.C. Ct. IF. R. 12; *Castellanos*, 127 Daily Wash. L. Rptr. at 1194.

[56] All the restrictions placed on the petitioner apply equally to the *pro se* petitioner, the petitioner represented by counsel, or the petitioner represented by Corporation Counsel.

[57] D.C. Ct. IF. R. 8(a).

[58] *Williams v. Williams*, IF. No. 795-89 (D.C. Super. Ct. Nov. 6, 1989).

[59] D.C. Ct. IF. R. 8(b).

[60] *Compare* D.C. Code Ann. § 23-1322(a) (1989) (criminal pretrial detention provision).

Finally, the fundamental idea of the Constitution as a shield from the overwhelming power of the State scarcely applies to a battered woman's effort to save her life by invoking the ordinary processes of civil law. In fact, in a battering relationship, it is the batterer who has the power and the control.[61] This led the United States Commission on Civil Rights to recommend against even mediating domestic violence cases because the abused victim fears her batterer and faces coercion.[62] It requires a great deal of personal courage for the victim in such a relationship to break free of her oppressor and seek recourse in the courts.[63] The State, as prosecutor, is not similarly inhibited.

Thus, the concerns with prosecutorial overreaching that justify application of double jeopardy analysis do not apply here, where the battered woman is a separate entity from the government, lacks "sovereign resources and power," and needs protection from the respondent.

B. No Interest In Finality Bars Successive Proceedings Against A Respondent Whose Violent Acts Constitute A Crime Separate From His Violations Of A Civil Protection Order.

The primary basis cited by the D.C. Court of Appeals to justify its application of the Double Jeopardy Clause to this case is "the impact on the defendant" of two proceedings. *Dixon*, 598 A.2d at 732. The defendant's interest alone does not determine a double jeopardy claim.[64] Here any such interest certainly did not outweigh the District's interest in its legislative approach to ending domestic violence, the District's right to enforce the criminal laws, and Ms. Foster's right to use the civil legal processes to help guarantee her personal safety.

First, a respondent's expectation of finality must be a legitimate expectation, *see United States v. DiFrancesco*, 449 U.S. 117, 136-37 (1980), and here it is not. In the District of Columbia, the legislature has determined that a respondent should be held accountable for his violation of a Civil Protection Order through a contempt motion in the Family Division; indeed, his Civil Protection Order informs him of that fact.[65] The legislative scheme explicitly *also* permits criminal prosecution for the violence. A respondent can anticipate both consequences, so he has no legitimate expectation of finality.[66]

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[61] Within a battering relationship "the major control and power seemed to be vested in the man." Lenore E. Walker, *The Battered Woman Syndrome* 147 (1984).

[62] United States Commission on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* 75 (January 1982).

[63] *See* Leslye E. Orloff, *Manual on Intrafamily Cases for D.C. Superior Court Judges* 106 (1991) (the fear of further abuse or the fear that the justice system will not halt the violence inhibits many domestic violence victims from filing contempt motions).

[64] *See, e.g., Wade v. Hunter*, 336 U.S. 684, 688-89 (1949) (A rule allowing a defendant to go free if the trial fails to end in a final judgment "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. . . . [T]he purpose of the law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again."); *United States v. Jorn*, 400 U.S. 470, 480 (1971) (plurality opinion) ("[A] mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide.").

[65] D.C. Ct. IF. R. 11(a). The court's form Order states, "FAILURE TO COMPLY WITH THIS ORDER MAY RESULT IN FINE OR IMPRISONMENT." J.A. 18.

[66] Our legal system has always recognized that private civil remedies exist separate and apart from the criminal law. It is not at all unusual that an individual who has violated the basic norms of our social order will be held separately accountable under both the public criminal law and the private civil law. Therefore, it can come as no

Second, the Double Jeopardy Clause has never been interpreted so broadly as to deprive the community of its "one full and fair opportunity to convict those who have violated its laws." *Ohio v. Johnson*, 467 U.S. 493, 502 (1984); *Arizona v. Washington*, 434 U.S. 497, 509 (1978); *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). In fact, the "finality guaranteed by the Double Jeopardy Clause is not absolute, but instead must accommodate the societal interest in prosecuting and convicting those who violate the law." [67]

The holding below allows private parties pursuing their own individual interests, often ill-prepared and ill-equipped to make decisions on behalf of society at large, to immunize from prosecution persons guilty of serious crimes against the community—rendering them subject only to the modest penalties which can be imposed for a finding of contempt.[68] Indeed, while Ms. Foster *partially*

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surprise to Respondent that the U.S. Attorney's office would act on behalf of the community at large, and his victim would act to protect her interests.

[67] *Garrett v. United States*, 471 U.S. 773, 796 (1985) (O'Connor, J., concurring). *See also United States v. Tateo*, 377 U.S. 463, 466 (1964); *cf. Breed*, 421 U.S. at 534-35 (societal interest in its juvenile court system recognized).

[68] Contempt may be punished by not more than $300 and/or six months imprisonment. D.C. Ct. IF. R. 12(e). The more severe punishment under the criminal law is undercut in every state that has applied *Grady* to determine whether a respondent's contempt of a domestic violence protection order bars his later criminal prosecution. *Burge v. Commonwealth*, 1992 WL 57138 (Ky. Ct. App. Mar. 27, 1992) (ten year sentence for burglary barred by contempt finding of restraining order which resulted in sentence of ninety days imprisonment); *State v. Magazine*, 393 S.E.2d 385 (S.C. 1990) (sentence of five years imprisonment and $1,188 restitution barred by prior contempt of restraining order which resulted in sentence of one year imprisonment suspended upon payment of fine of $1,500 and compliance with the order); *State v. Kipi*, 811 P.2d 815 (Haw. 1991), *cert. denied*, 112 S. Ct. 194 (1991) (prosecution for burglary in the first degree, with a maximum penalty of ten years imprisonment, and three counts of terroristic threatening in the second de-

succeeded on her contempt motion, an individual petitioner who loses the motion, perhaps because her inadequate private resources precluded her from obtaining necessary testimony, will still bar the State's subsequent criminal suit. Thus, the government's interests in enforcing its criminal laws would be subject to the whims and weaknesses of individual plaintiffs and their counsel.[69]

The decision below also opens up the criminal law system to abuse. A victim might file the contempt motion and, after a minimal amount of evidence is heard, be coerced or convinced to drop the matter—nonetheless precluding subsequent prosecution by the State.[70] Moreover, the double jeopardy theory propounded by the court below allows an abuser's active defiance of a court order and repeated acts of terror to work to his advantage.

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gree, with a maximum penalty of one year imprisonment for each count, barred by no contest plea on contempt of restraining order which resulted in five months incarceration).

[69] As Justice Stewart once warned, "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring). At least one study found that sixty-three percent of the young males between the ages of eleven and twenty who are incarcerated for homicide killed their mother's batterer. *Women and Violence, Hearings before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. (1990) (testimony of Sarah M. Buel) (citing Hal Ackerman, *The War Against Women: Overcoming Female Abuse* 2 (1985)). Similarly another study found that forty percent of women held in Cook County, Illinois on homicide charges are accused of killing their batterer. Note, *Defense Strategies for Battered Women Who Assault Their Mates: State v. Curry*, 4 Harv. Women's L. J. 161, 161 (1981). Those concerns underscore the need for an effective legal response.

[70] *Cf. Wheeler*, 435 U.S. at 330-31 (recognizing a defendant's motive to have the first case adjudicated in tribal court, with its limited available punishments, and thereby frustrate federal interests in the prosecution of major offenses if double jeopardy applied to the first adjudication).

The more aggressively he terrorizes, the greater the victim's need to seek immediate enforcement of the order of protection, and the more likely his acts will be immunized from more severe criminal penalties.[71]

Cognizant of the effect its decision would have on the statutory scheme, and on criminal law enforcement specifically, the D.C. Court of Appeals suggested that the problem it was creating by extending double jeopardy protection to private contempt motions might be mitigated if women carefully worded their contempt motions. *Dixon*, 598 A.2d at 732-33. It opined, for example, that the victim could file for contempt on the breach of the stay away portion of her order, without jeopardizing a later criminal prosecution for an associated assault. This strategy ignores the fact that most motions are pursued *pro se*. *Pro se* litigants cannot be expected to know the fine points of double jeopardy law; nor will they carefully word their testimony to avoid bringing information that might be prosecuted as criminal to the court's attention. Moreover, this artful approach fails to vindicate the woman's interest in having all the contemptuous behavior brought to the court's attention, so that the court understands the seriousness of the danger she encounters and the nature of the respondent's actions. While the D.C. Court of Appeals has recognized in a related context that courts should consider the "entire mosaic" of abuse in order to fashion an appropriate response to domestic violence,[72] its suggestion in this case that the contempt motion be narrowly tailored undermines that theory. Indeed, it invites the victim to engage in a charade, hinting at the nature of the violence without speaking the prohibited words, leaving the court to guess at the seriousness of the abuse she confronts.

Finally, the lower court's emphasis on the defendant's interest ignores the battered woman's equal right to pro-

[71] *Cf. Commonwealth v. Allen*, 486 A.2d 363, 370 (Pa. 1984), *cert. denied*, 474 U.S. 842 (1985).

[72] *Cruz v. Foster*, 597 A.2d 927, 931 (D.C. 1991).

tect her own life, and her need for an effective civil remedy. The decision below makes the victim choose between enforcing her order to protect her life (thereby cutting off the State's ability to prosecute her batterer criminally) or foregoing her personal protection in the hope (often not realized) that the State will enforce its criminal laws. Yet both avenues must be maintained for victims of domestic violence if such violence is to be stopped. The Constitution does not require or permit otherwise.

IV. EVEN IF JEOPARDY ATTACHES TO THE ENFORCEMENT OF A CIVIL PROTECTION ORDER, THE CRIMINAL CHARGES ARE OFFENSES DISTINCT FROM RESPONDENT'S VIOLATIONS OF THE CIVIL PROTECTION ORDER.

If this Court were to hold that jeopardy may attach to a battered woman's enforcement of her civil protection order, the correct test to apply in determining whether there have been successive prosecutions for the "same offense" would be that enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932). In *Grady*, this Court held that the "same offense" analysis does not stop with *Blockburger* where successive prosecutions raise serious concerns about the kind of governmental overreaching and abuse that the Double Jeopardy Clause guards against. 495 U.S. at 518. As explained above, those are precisely the concerns that are not present in this case. Thus, the *Blockburger* test, rather than the *Grady* "same conduct" analysis, is controlling.

Under *Blockburger*, where there are "two distinct statutory provisions," the Court determines "whether there are two offenses," by examining the elements of each statute. *Blockburger*, 284 U.S. at 304. Where those elements are so different, as they are here, then it becomes clear that the two statutory provisions were designed by the legislature to serve different functions, and it becomes impossible to say they are the "same"

offense. Only where the two offenses have "identical statutory elements or . . . one is a lesser included offense of the other," *Grady*, 496 U.S. at 516, is there a double jeopardy bar. *See Felix*, 112 S. Ct. at 1384 ("*Blockburger* . . . bars a subsequent prosecution if one of the two offenses is a lesser included offense of the other.").

Thus, the issue is whether the elements of contempt of the Civil Protection Order, on the one hand, and the statutory crimes of assault, threats and assault with intent to kill, on the other, are the same or different. The conclusion of the D.C. Superior Court below was that they were indeed different.[73] The D.C. Court of Appeals also implicitly reached the same conclusion when it addressed the second prong of the double jeopardy analysis announced in *Grady*, the "same conduct" test, which by its terms may be reached only if the *Blockburger* analysis shows that there are indeed two distinct offenses. *Grady*, 496 U.S. at 516.

The findings necessary to convict for contempt are the existence of a court order and the willful violation of it. *See In re Thompson*, 454 A.2d 1324, 1326 (D.C. 1982); *In re Gorfkle*, 444 A.2d 934, 939 (D.C. 1982). Quite obviously, the elements of contempt bear no similarity to *any* of the statutory elements of the substantive crimes—"Assault with Intent to Kill," "Assault or Threatened Assault in a Menacing Manner," and "Threats to do Bodily Harm"—with which Respondent was charged.[74]

Only by taking the unprecedented step of injecting the terms of the civil protection order into the analysis of contempt can one create any similarity at all

[73] *United States v. Foster*, No. F-8415-88, Pet. App. 23a (D.C. Super. Ct. Apr. 13, 1989).

[74] The five-count indictment in this case sets forth violations of the following D.C. Criminal Code provisions: assault with intent to kill, § 22-501; assault or threatened assault in a menacing manner, § 22-504; and threats to do bodily harm, § 22-507. J.A. 43-44.

between the contempt and the substantive crimes in the *Blockburger* sense. But even then, the *Blockburger* test still would not result in a finding of double jeopardy here.

The Civil Protection Order at issue here directed Respondent not to "molest, assault, or in any matter threaten or physically abuse" his wife Ana Foster. The general prohibition on "assault" in the protection Order at issue here no more invoked all of the elements of a crime than do the other commonly used terms on the court's form Order requiring that a respondent "stay away" and not "molest" his victim, for which there is no criminal statutory counterpart.[75] The legislature never specified that enforcement of protection orders entered in these private civil proceedings required the victim to prove the elements of particular statutory crimes.[76] All of the statutory offenses with which Respondent is charged entail an element of specific intent. In contrast, contempt itself is not a specific intent crime, *In re Hunt*, 367 A.2d 155, 157 (D.C. 1976), *cert. denied*, 434 U.S. 817 (1977), but does require proof of willfulness. Accordingly, the elements of the offenses are not the same and in no sense is one offense the lesser included offense of another.

In this case, whether one looks at the elements of each offense or takes the unprecedented step of incorporating

[75] *See* J.A. 18.

[76] *Compare Harris v. Oklahoma*, 433 U.S. 682 (1977) (per curiam) ("[i]n a felony murder case, the proof of the underlying felony [here robbery with firearms] is needed to prove the intent necessary for a felony murder conviction.").

Moreover, it would be remarkable indeed for the D.C. Council to have regarded the statutory crimes as lesser included offenses of contempt (which at a minimum would involve violation of the statute *compounded* with willful violation of a court order) and yet subject the contemnor to only the minimal punishments applicable to contempts. This anomaly only highlights the inherent difficulty in attempting to extend double jeopardy law to the enforcement of an order entered for the benefit of a private party in civil litigation.

the terms of the Civil Protection Order into the "elements" analysis, the "offenses" were distinct and the criminal prosecution in this case was permissible.

CONCLUSION

The judgment in *United States of America v. Foster*, No. 91-1231, should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

ARIZONA COALITION AGAINST DOMESTIC VIOLENCE

The Arizona Coalition Against Domestic Violence (ACADV) is a non-profit organization formed in 1980 to develop a system of networking among domestic violence programs, professionals, and interested citizens throughout Arizona. The goal of ACADV is to increase awareness of domestic violence, to improve the care and treatment of those affected by domestic violence, and to reduce violence in our state.

AYUDA, INC.

AYUDA, Inc. is a non-profit tax exempt organization founded in 1971 which offers legal representation to indigent Spanish-speaking and foreign born residents of the District of Columbia. Since 1985, AYUDA has represented 98% of all Spanish-speaking victims of domestic violence in the District who turn to the D.C. courts for protection. AYUDA represented Ms. Ana Foster in the proceeding to enforce her civil protection order. AYUDA also serves as a national advocate for battered women, with expertise in serving immigrant and refugee women and children and training judges, policy and health professionals on domestic violence.

CALIFORNIA WOMEN'S LAW CENTER

The California Women's Law Center was established in 1989 as the first law center in Southern California solely devoted to addressing the civil rights of women and girls. The Law Center's priorities for its legal work include addressing violence against women, including domestic violence and sexual assault. The Law Center's primary efforts emphasize support and technical and legal assistance to legal service agencies, community based organizations, attorneys and policy makers.

The protection of women and girls from the ravages of domestic violence is one of the most critical issues facing women in California, as well as the rest of the country. Since many of the most effective ways our society has identified for aiding these millions of victims is through greater access to the civil and criminal law systems, the Women's Law Center is deeply involved in making the courts and agencies more accessible and more responsive. A decision, such as the one in question, that essentially robs a victim of one of her most effective remedies is extremely dangerous and one in which we take a great deal of interest, and have extensive background and expertise.

CATHOLIC UNIVERSITY LAW SCHOOL'S FAMILY ABUSE PROJECT

The Family Abuse Project is part of the Columbus Community Legal Services, operated by the Columbus School of Law, the Catholic University of America. Since 1978, the Family Abuse Project has provided legal representation to victims of domestic violence, trained law students and lawyers about remedies for domestic violence, and provided advocacy to improve the community's response to domestic violence. Each year, the Project assists women in obtaining Civil Protection Orders and in ensuring compliance with those orders in contempt proceedings.

CENTRO DE AMISTAD, INC.

Centro de Amistad, Inc. began in 1977 as a CETA funded project of the newly incorporated Town of Guadalupe to address the serious alcohol abuse problem in Guadalupe, Arizona. Today Centro has three general areas of programs and services: outpatient psychotherapy, prevention/early intervention, and health education and empowerment. Centro helps adults with mental health problems (including domestic violence), substance abuse problems, and serious mental illness. Centro also provides programs for children (including

children with behavioral problems and children who are victims of a crime such as physical, emotional or sexual abuse).

CHICANOS POR LA CAUSA

Chicanos Por La Causa (CPLC) is a non-profit community-based organization established in 1969 to address the social and economic needs of Hispanics and the economically disadvantaged. As a statewide Community Development Corporation, CPLC's services and programs are designed to have a measurable impact on the causes of poverty and dependency within Arizona in order to promote self-sufficiency.

In February of 1986, CPLC added to its continuum of care, domestic violence shelter and transitional services for women and their children through De Colores. It is the largest shelter for victims of domestic violence in Maricopa County with a static capacity of twenty-four crisis and sixteen transitional beds. The staff is completely bilingual and bicultural, and is thus uniquely equipped to shelter and advocate for the monolingual Spanish speaking victims of domestic violence.

COLORADO DOMESTIC VIOLENCE COALITION

The Colorado Domestic Violence Coalition is a statewide, grassroots, non-profit, membership organization which has been coordinating services for battered women and their families since 1981. The Coalition is dedicated to the elimination of domestic violence. Through regular meetings, technical assistance, community education, advocacy and action, the Coalition provides a comprehensive approach to funding and service provision across the state. The membership of the Colorado Domestic Violence Coalition is currently comprised of forty-three rural and urban programs for battered women and their families.

D.C. COALITION AGAINST DOMESTIC VIOLENCE

The D.C. Coalition Against Domestic Violence (DCCADV) is a coalition of groups which was formed

in 1986 and engages in activities to promote the elimination of domestic abuse in the District of Columbia and to advocate on behalf of battered women and their families. Its members include shelters for battered women, advocacy groups, legal organizations, and individuals.

DCCADV has a special interest in the issues presented in this case because the result will directly affect its members who live and work in the District of Columbia, and benefit from the parallel civil and criminal proceedings available under the Intrafamily Offenses Act.

FAMILY VIOLENCE PREVENTION FUND

The Family Violence Prevention Fund is a national public policy and educational institute working towards improving society's response to domestic violence. The Fund, which is located in San Francisco, has developed and implemented model policies and training protocols on a local, state, and national level for law enforcement, prosecutors, judges, probation officers, health care professionals, and legal advocates. In addition, the Fund provides services to victims of domestic violence seeking the protection of the justice system, and has conducted extensive public education campaigns on domestic violence.

FRIENDLY HOUSE INC.

Friendly House Inc. is a nonprofit, community-based organization in Phoenix, Arizona founded in 1920 to assist people in need, primarily Hispanic immigrant families. Friendly House Inc. provides legal services for immigration matters; adult education classes including English as a Second Language, citizenship, literacy, and high school equivalency; youth services including tutoring, recreation, and cultural activities; and family social services including individual and family counseling, parent skills training and emergency assistance. Friendly House Inc. is a well-established advocate for immigration matters, improved education for Hispanics, substance abuse and gang prevention, and behavioral health services for the improved functioning of the family.

Numerous women in the parent training classes and/or who are involved in counseling at Friendly House Inc. are battered women. A number of cases of battered women are also identified through the immigation services at Friendly House. Friendly House Inc. offers their support for whatever recourse there may be for protecting these women and offering them a better life of safety and hope.

GEORGE WASHINGTON UNIVERSITY NATIONAL LAW CENTER'S COMMUNITY LEGAL CLINICS

The Community Legal Clinics (CLC), operated by George Washington University National Law Center, provides a variety of legal services to indigent people, including representation in family law litigation. Through its Civil and Family Litigation Clinic, the CLC trains students, consults with pro bono attorneys, and represents numerous clients in domestic violence proceedings in the D.C. Superior Court and also advocates for battered women on policy matters that arise locally and nationally. The decision under review, if affirmed, could be devastating for the CLC's clients, by severely restricting their ability to enforce their civil protection orders.

GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC

The Georgetown University Law Center Sex Discrimination Clinic is a clinical program in which law students represent domestic violence victims suing under the Intrafamily Offenses Act in D.C. Superior Court. Each year, the Clinic provides legal representation to approximately thirty to fifty clients, and gives legal counselling to another 100 victims of domestic violence.

The Clinic also administers the Emergency Domestic Relations Project (EDRP), which is co-sponsored by the D.C. Coalition Against Domestic Violence. EDRP provides free counseling and negotiation services for victims

of domestic violence in the District of Columbia. It also refers callers to community resources and secures representation for victims from volunteer attorneys who have been trained through EDRP. EDRP provides information about the court process and negotiates consent orders for nearly 2,000 victims each year at the D.C. Superior Court. It has worked with more than 20,000 victims over the past fourteen years.

HARVARD LAW SCHOOL BATTERED WOMEN'S ADVOCACY PROJECT

The Harvard Law School Battered Women's Advocacy Project (BWAP) has provided Boston-area women with courtroom advocacy, a hotline, and referral services since its inception in 1988. BWAP also has a legislative task force working to strengthen the institutional protection offered to victims of domestic violence.

The fact that a woman has pursued a contempt motion against her batterer for a violation of her temporary restraining order should not preclude a prosecutor from prosecuting the underlying crime. It is especially in the instance of a TRO violation that a prosecutor should take notice of the case and pursue criminal charges if warranted.

ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE

The Illinois Coalition Against Domestic Violence was instrumental in developing the Illinois Domestic Violence Act of 1986 specifically to protect victims of domestic violence. Illinois law allows for both civil and criminal remedies and relief for victims.

To uphold the decision that bars prosecution of criminal acts by virtue of a finding of guilty in a civil matter is to fly in the face of the intent of lawmakers who understand the need to protect these victims from the very real escalating dangers they face.

MY SISTER'S PLACE

My Sister's Place is a not-for-profit shelter for battered women and their children in Washington, D.C. My Sister's Place is in a confidential location for the protection of the women who temporarily live there after escaping abusive partners. For many women, the shelter provides the first safe space that they have had in years. These women also rely on legal remedies, including civil protection orders, for their personal safety.

NATIONAL BATTERED WOMEN'S LAW PROJECT OF THE NATIONAL CENTER ON WOMEN AND FAMILY LAW

The National Battered Women's Law Project, a program of the National Center on Women and Family Law, acts as a legal backup to legal services programs, battered women's programs and *pro bono* attorneys in all fifty states. It serves as an information clearinghouse for advocates, attorneys and policymakers on legal issues facing battered women; produces manuals, handbooks, public education materials and resources packets on these legal issues; analyzes federal and state legislative and administrative developments and other legal issues which affect battered women; assists advocates, policymakers and attorneys on issues faced by battered women; and reports on legal and legislative developments with respect to battered women's issues in *The Women's Advocate*, the bi-monthly newsletter of the National Center on Women and Family Law.

The National Center on Women and Family Law was established thirteen years ago as the family law backup center for all legal services programs funded by the Legal Services Corporation and for *pro bono* attorneys. Since its inception it has primarily focused on domestic violence, custody and mediation and produced numerous manuals and information packets for attorneys. The Center has filed many amicus briefs in the U.S. Supreme

Court and state supreme courts throughout the United States in cases raising issues of importance to poor women.

The Project has been particularly concerned with protecting battered women, including through the civil and criminal enforcement remedies. This country, which has come a long way in the last twenty years in recognizing domestic violence and acting to protect its victims, must not be denied the means to effectively deal with this most serious problem.

NATIONAL COALITION AGAINST DOMESTIC VIOLENCE

The National Coalition Against Domestic Violence, a private, non-profit organization founded in 1978, is a Coalition of service providers, state domestic violence coalitions, and concerned individuals dedicated to the empowerment of battered women and their children, and committed to working toward societal changes necessary to eliminate both personal and societal violence against all women and children.

NEW JERSEY COALITION FOR BATTERED WOMEN

The New Jersey Coalition for Battered Women is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, the Coalition is a private non-profit corporation whose members include all non-governmental domestic violence programs in New Jersey. The Coalition advocates for battered women with state level governmental organizations, private organizations, the state legislature, and the governor to support legislation and policies that will benefit victims of domestic violence.

NEW YORK CITY COALITION OF BATTERED WOMEN'S ADVOCATES

The New York City Coalition of Battered Women's Advocates is a non-profit organization dedicated to ending violence and abuse in the lives of women and children. As a grassroots organization of programs and individuals, we work to increase the public visibility of violence in intimate relations through education, advocacy and action. The Coalition holds the police, legal system, housing and public benefits agencies, media and other institutions accountable to the needs of battered women.

The Coalition has twenty members, including community-based battered women's programs, shelters, lawyers who represent battered women and other advocates in the City of New York. The Coalition as a whole works to educate the legal system as to the needs of battered women and to advocate for changes in policies and procedures.

The enforcement of orders of protection and the ability of the State to prosecute batterers are issues of vital importance to all Coalition members and to the thousands of battered women with whom they work. Battered women must be able to obtain proper protection from the courts without prejudicing possible actions to be taken by the State.

NOW LEGAL DEFENSE AND EDUCATION FUND

The NOW Legal Defense and Education Fund (NOW LDEF) is a national public service organization dedicated to eliminating sex discrimination and achieving equality for women through legal and education programs. NOW LDEF was founded as an independent non-profit corporation in 1970 by the leaders of the National Organization for Women, a membership organization of approximately 250,000 women and men in over

800 chapters nationwide. Violence against women is a major focus of NOW LDEF's work. NOW LDEF has participated as counsel and as amicus curiae in domestic violence litigation and has worked extensively on legislation to expand the legal rights of battered women.

OREGON COALITION AGAINST DOMESTIC & SEXUAL VIOLENCE

The Oregon Coalition Against Domestic & Sexual Violence (OCADSV) is a non-profit corporation, incorporated under the laws of the State of Oregon since 1978. The OCADSV has thirty-one member programs that provide direct services to victims of domestic and sexual violence throughout Oregon. The purposes of the OCADSV include, but are not limited to the following: providing assistance to victims of domestic and sexual violence; providing training assistance to staff of organizations engaged in crisis intervention or education in domestic and sexual violence; encouraging increased awareness and understanding of domestic and sexual violence, through public education; exploring and supporting innovative approaches to prevention of and responses to domestic and sexual violence.

Oregon was the first state to pass a comprehensive Family Abuse Prevention Act, and Oregon's scheme for responding to domestic violence relies on both civil and criminal remedies. Punishment for violation of a restraining order is punishment for contempt of the civil court's order. Punishment for assault is punishment for violation of the criminal law. Both are necessary to protect victims of domestic violence and exact compliance with the law. The Family Abuse Prevention Act's remedies work to insure the integrity of the judicial process as well as to provide relief to individual victims and protection to the general citizenry.

PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE

The Pennsylvania Coalition Against Domestic Violence, a non-profit, tax exempt organization founded in 1976, is a state-wide coalition committed to the elimination of domestic abuse of women and their children in Pennsylvania, and to the provision of comprehensive local services for victims.

Annually assisting over 77,000 victims of domestic violence, PCADV's fifty-eight member programs provide 24-hour Hotlines, emergency shelter, counseling, advocacy, court accompaniment, transitional housing, and community education. Representatives of PCADV regularly provide consultation, training, and technical assistance to members of the Pennsylvania Legislature, the Judiciary, the Bar, Law Enforcement Agencies and Domestic Violence Programs.

WOMEN'S LEGAL DEFENSE FUND

The Women's Legal Defense Fund (WLDF) is a non-profit, tax-exempt organization founded in 1971 to assist women in their efforts to achieve equality under law. WLDF is a national advocacy group which represents women before public agencies and courts. For many years, WLDF also provided legal counseling and referrals to victims of domestic abuse, including assistance in seeking and enforcing civil protection orders. In addition, WLDF started and operated a battered women's shelter in the District of Columbia and was instrumental in coalition efforts that resulted in the 1982 amendments expanding the protections provided by the D.C. Intrafamily Offenses Act.

APPENDIX B

SUPERIOR COURT OF D.C.— INTRAFAMILY RULES

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for the

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

PART FIVE *
INTRAFAMILY PROCEEDINGS

RULE 1

SCOPE AND PURPOSE

These rules govern the procedure in all proceedings regarding intrafamily offenses as defined in Title 16, Section 1001 et seq. of the D.C. Code. The purpose of these rules is to provide for the just determination of every such proceeding in as fair, speedy and inexpensive a manner as possible within the principles of law and equity and to effectuate the statutory intent of eliminating intrafamily violence.

Except where inconsistent with these intrafamily rules or with the expeditious nature of intrafamily proceedings, the following Superior Court Rules of Civil Procedure are deemed applicable to intrafamily proceedings: 2, 5, 5-I, 6, 9, 11, 43 (as modified by SCR Dom. Rel. 43(a)), 43-I, 44, 44-I, 44.1, 46, 60, 61, 63, 63-I, 77, 77-I, 79, 79-I, 80, 82, 84, 86-I, and 101.

The institution of a criminal charge by the United States Attorney shall not preclude the issuance of a Temporary Protection Order or Civil Protection Order based on the same conduct of the respondent as alleged in the criminal proceeding.

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* All new rules. Previous text not shown.

RULE 2

COMMENCEMENT OF ACTION

(a) PETITION. An intrafamily proceeding shall be commenced by filing a petition pursuant to D.C. Code § 16-1003(a). The petition shall be signed under oath and supported by affidavit, reciting the facts and circumstances upon which the complainant believes that an intrafamily offense is threatened or has been committed.

(b) AMENDMENT. The petition may be amended at any time prior to the conclusion of the hearing on the merits. Such amendments shall be under oath. Oral motions to amend the petition made during the hearing shall be granted in the absence of a showing of prejudice to the respondent.

(C) CONSOLIDATION WITH OTHER MATTERS. When a petition is filed the clerk shall note in the file the existence of any other causes before the Family Division involving the same parties. If deemed appropriate, the Court may consolidate the action with the other causes, provided that said consolidation shall not delay any hearing on the petition for a Civil Protection Order. Copies of the order of consolidation shall be filed in each case consolidated, and all further proceedings shall be conducted in one action designated in the order of consolidation, with all subsequent pleadings and orders filed in each case consolidated.

RULE 3

SERVICE OF PROCESS

(a) ISSUANCE. Upon the filing of the petition, the intrafamily clerk shall issue a notice of hearing and order directing appearance, which shall bear the name and seal of the Court and the Family Division and the title of the action. It shall direct the respondent, petitioner and, if appropriate, the family member(s) endangered

(or if a child, the person then having physical custody of the child) to appear in court on a date and at a time certain for hearing, which shall be scheduled by the clerk for the earliest return date possible. An original of the petition and copy for each person named in the petition or other individual whose presence is required, shall be presented to the intrafamily clerk for issuance. The intrafamily clerk shall send a notice of the hearing to the Director of Social Services.

(b) PERSONAL SERVICE.

(1) PERSONS AUTHORIZED TO SERVE PROCESS. The intrafamily clerk shall deliver the notice of hearing and order directing appearance to the petitioner for service by the U.S. Marshal, his/her deputy or any competent person over the age of eighteen (18) years who is not a party to and is not otherwise interested in the action and who is a bonafide resident of, or has a regular place of business in the District of Columbia. The service to be made upon the respondent or other person(s) named shall be personal service.

(2) MANNER OF SERVICE. The petition, notice of hearing and order directing appearance shall be served together. The petitioner shall furnish the person making service with necessary copies of the petition, notice of hearing and order directing appearance. Service shall be made upon an individual, other than an infant or an incompetent person, by delivering a copy of the petition, personally, or by leaving copies thereof at his or her dwelling house or usual place of abode with a person of suitable age and discretion then residing therein who is not a party. Service upon an infant or incompetent person shall be made by serving the petition and notice of hearing and order directing appearance in the manner prescribed by the law of the District of Columbia or the law of the state in which service is made.

(c) RETURN OF SERVICE. The person serving the process shall make proof of service to the Division

promptly and in any event by the date the person served must appear in Court. If service is made by a person other than a U.S. Marshal or his/her deputy, the person making service shall submit an affidavit stating the date, place and manner of service, including the name of the person served and specific facts from which the Court can determine that the person meets the qualifications for receipt of process, on the form provided by the intrafamily clerk. Failure to make proof of service does not affect the validity of the service.

(d) AMENDMENT OF RETURN OF SERVICE. At any time in its discretion and upon such terms as it deems just, the Division may allow any proof of service of process to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

RULE 4

CONTINUANCE

(a) THE "TWO DAY" RULE. Except in extraordinary and unforeseen circumstances, no continuance may be granted in any case unless requested at least two (2) days prior to the date set for hearing.

(b) DETERMINATION BY ASSIGNMENT COMMISSIONER. The Assignment Commissioner shall grant or deny consent continuances under Family Division Guidelines only where the petitioner is represented by counsel, and counsel certifies that he or she has consulted with, and obtained the approval of, his or her client for the continuance.

(c) DETERMINATION BY THE COURT. Where the continuance request is ex parte or opposed, or where the petitioner is appearing pro se, the judge assigned to hear intrafamily matters shall grant or deny the request.

(d) DAY OF HEARING CONTINUANCE. If the Court grants a continuance on the day of the hearing it

may condition that continuance on the granting of a Temporary Protection Order for fourteen (14) days. If the continuance is at the request of the respondent and a Temporary Protection Order has previously been entered, the Court may condition the continuance on an extension of the Order as circumstances may necessitate.

RULE 5

FAILURE TO APPEAR

(a) BENCH WARRANTS. If any party fails to appear in accordance with a notice of hearing and order directing appearance which has been served on that party in accordance with Rule 3, the Court may issue a bench warrant.

(b) EXECUTION OF BENCH WARRANTS. Upon execution of a bench warrant issued pursuant to paragraph (a) of this rule, the Court shall hold a hearing no later than the next available Court day. If a Temporary Protection Order or Civil Protection Order has previously been issued by the Court but not served upon the party, the party shall be served with a copy of the Order in Court. The Court shall release the party after notifying him or her, in writing, of a subsequent hearing date and after setting any conditions of release deemed necessary to protect the safety of the petitioner and the petitioner's family. Unless it appears that such an order is unwarranted, the Court shall include a condition requiring the respondent to avoid any contact with the petitioner or the petitioner's family.

(c) FAILURE OF RESPONDENT TO APPEAR AT HEARING ON PETITION FOR CIVIL PROTECTION ORDER. Where the respondent fails to appear at a hearing on a petition for a Civil Protection Order, after being served pursuant to Rule 3 with a notice of hearing and order directing appearance, the Court shall enter the respondent's default and set the matter down for proof

of the allegations of the petition. The Court shall send notice of this hearing to the respondent. The Court may also issue a Temporary Protection Order pursuant to Rule *7(a), in which case the date set for hearing shall be prior to expiration of the Temporary Protection Order.

(d) FAILURE OF RESPONDENT TO APPEAR AFTER A DEFAULT HAS BEEN ENTERED. If, after a default has been entered pursuant to paragraph (c) of this rule, the respondent fails to appear on the return date specified in the order of appearance, and the Court determines that there is good cause to believe the allegations in the petition, the Court shall enter a Civil Protection Order as a final Order by default. The default Order shall not be set aside unless, no later than ten (10) days after service of the Civil Protection Order, the respondent files and serves a motion to vacate the default, supported by affidavit showing both good cause for the failure to appear and grounds which, if proved, would be sufficient to prevent the issuance of the Civil Protection Order in whole or in part. A hearing may be held on the motion to vacate.

(e) PERSONAL SERVICE REQUIRED FOR TEMPORARY PROTECTION OR CIVIL PROTECTION ORDER. A Temporary Protection Order or Civil Protection Order issued in the absence of the respondent shall be valid but not enforceable against the respondent until the Order has been served personally on the respondent.

(f) PROCEDURE UPON FAILURE OF THE PETITIONER TO APPEAR. Where the petitioner fails to appear in accordance with a notice of hearing, the Court may dismiss the petition, may continue the case for further hearing if the allegations so warrant, or may return the case to files.

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* Correction

RULE 6

PLEADINGS ALLOWED: FORM

(a) PLEADINGS. There shall be a petition and an answer. No other pleading shall be allowed unless authorized by the Court.

(b) CAPTION; NAMES OF PARTIES. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the names of the parties, the file number and the type of pleading.

(c) STATIONERY AND LOCATIONAL INFORMATION. All papers for which forms are not provided shall be on plain white paper, approximately [13]* *11* inches long and 8½ inches wide, and stating under the caption the nature of the pleading and the relief, if any, requested. All pleadings and other papers shall set forth in the caption the name and full residence address of the parties, if known. Petitioners shall not be required to state their residence addresses provided that they substitute the name and address of their attorney or a third person willing to accept mailings for them and in care of whom such mailings may be sent. A paper which has a substituted address shall be clearly marked to indicate that such a substitution has been made.

(d) NONCONFORMANCE WITH ABOVE. A pleading or other paper not meeting the requirements of this rule shall not be accepted for filing. (Added 1/5/87)

RULE 7

MOTIONS

(a) MOTION FOR TEMPORARY PROTECTION ORDER.

(1) HEARING. On filing a petition, a petitioner may, by motion, request a Temporary Protection Order.

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* Bracketed material struck through on original.

The clerk shall schedule a hearing on the motion in Judge-in-Chambers for the same day. (Added 1/5/87)

(2) SCOPE OF ORDER. If the Court determines from testimony, or from the petition and affidavit, that the safety or welfare of a family member is immediately endangered, a Temporary Protection Order may be issued ex parte. A Temporary Protection Order shall, by its terms, be of no longer than fourteen (14) days duration from the date it is issued. The Temporary Protection Order may include any of the remedies authorized with issuance of a Civil Protection Order. The Temporary Protection Order shall be served on the respondent, together with the petition and the notice required by SCR Intrafamily 3. (Added 1/5/87)

(3) HEARING ON MOTION. In cases where a Temporary Protection Order is issued, the hearing on the motion shall be scheduled for a date prior to the expiration of the Temporary Protection Order. (Added 1/5/87)

(b) MOTION TO DISMISS. Upon motion by any party, or on its own initiative, the Court may dismiss the petition at any time prior to the entry of a protection order. Such motion shall be in writing and supported by affidavit if made prior to the hearing date and shall be heard on the date set for hearing on the petition prior to taking testimony. Oppositions, if any, shall be filed not later than one (1) day before the hearing and shall be supported by affidavit. Motions to dismiss during the hearing on the petition may be made orally. Upon dismissal of a petition all temporary protection orders based thereon shall be revoked. (Added 1/5/87)

(c) MOTION FOR CONTEMPT FOR VIOLATION OF PROTECTION ORDER. When a motion for contempt is filed alleging violation of a Civil Protection Order or Temporary Protection Order, the intrafamily clerk shall issue a notice of hearing and order directing appearance. The motion shall be in writing and shall be

supported by affidavit. A statement of points and authorities shall not be required for a motion for contempt. The notice of hearing and order directing appearance shall be served in the same manner set forth in SCR Intrafamily 3. Punishment upon a finding of contempt shall be limited as provided in SCR Intrafamily 12(e).

(d) SERVICE UPON ADVERSE PARTY. A copy of any motion filed and any response to such motion shall be served upon the adverse party (or that party's attorney, if he or she is represented by counsel). However, service of a motion for a Temporary Protection Order need not be made if it clearly appears from the motion or the petition for a Civil Protection Order that the safety or welfare of a family member is immediately endangered.

RULE 8

GENERAL PROVISIONS REGARDING DISCOVERY

(a) DISCOVERY METHODS. For good cause shown and with due regard for the summary nature of the proceedings, the Court may authorize a party to proceed with discovery from the other party by requests for written interrogatories or production of documents. Other Superior Court Civil Rules of discovery available against non-parties may be utilized if approved by the Court. Requests for reports filed with the Metropolitan Police Department may be made directly to the Department. The frequency and use of these methods is limited pursuant to subparagraphs (b), (c), (d) and (e) herein. Every application for discovery must state whether there is a criminal proceeding pending involving the facts alleged in the petition.

(b) SCOPE OF DISCOVERY. Unless otherwise directed by the Court, the scope of discovery is limited to matters directly relating to the incident or incidents of abuse alleged in the petition or answer, and to medical treatment obtained as a result of those incidents.

(c) SEQUENCE AND TIMING OF DISCOVERY. Discovery may be initiated in any sequence provided that any discovery methods used shall be initiated within five (5) calendar days of service of the petition on the respondent. Time for discovery shall not be enlarged if it would delay the scheduled hearing on the petition provided that the respondent has been served with the discovery request at least seven (7) days prior to the hearing.

(d) PROTECTIVE ORDER. No methods of discovery shall be used or enforced which would require direct contact between the parties if either party objects. Upon motion by a party, the Court may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that discovery be denied; (2) that discovery be granted only on specified terms and conditions; (3) that certain matters not be inquired into or that the scope of discovery be limited to certain matters.

(e) RESPONSES TO DISCOVERY. Responses to requests for discovery shall be served on the other party and filed with the clerk's office not later than the close of business of the second day prior to the hearing.

(f) ALTERNATIVE DISCOVERY METHODS. Requests for discovery by methods other than written interrogatories or requests for production of documents shall be made by written motion with notice that objections must be filed, in writing, no later than three (3) days after service of the motion. The motion may be decided by the Motions Judge without hearing.

RULE 9

CONDUCT OF HEARINGS

(a) REPRESENTATION BY COUNSEL.

(1) BY PRIVATE COUNSEL. Whenever a petition for a Civil Protection Order or a motion pursuant to these rules is filed by a petitioner, at his or her initiative, the petitioner and the respondent may be represented by private counsel.

(2) REPRESENTATION BY THE CORPORATION COUNSEL. Whenever a petition for a Civil Protection Order or a motion pursuant to these rules is filed by the Corporation Counsel, the Corporation Counsel shall represent the petitioner unless private counsel enters an appearance in the case or the Court permits the Corporation Counsel to withdraw.

(b) EVIDENCE.

(1) UNDER OATH. In all fact-finding hearings the testimony of witnesses shall be taken under oath or affirmation.

(2) NON-JURY HEARING. The Court shall, without a jury, hear and adjudicate petitions for Civil Protection Orders and all motions made pursuant to these rules.

(3) WHO MAY PRESENT EVIDENCE.

(A) Whenever a petition for a Civil Protection Order or a motion pursuant to these rules is filed, both the petitioner and the respondent may present evidence, including testimony of themselves and other witnesses as well as physical evidence.

(B) In cases where a petition for a Civil Protection Order or a motion made pursuant

to these rules is filed by the Corporation Counsel, the Corporation Counsel may present evidence.

(4) ADMISSIBLE EVIDENCE.

(A) Evidence which is competent, material and relevant shall be admissible at fact-finding hearings.

(B) Notwithstanding D.C. Code § 14-306, one spouse shall be a competent and compellable witness against the other and may testify as to confidential communications, but such testimony compelled over a claim of privilege conferred by D.C. Code § 14-306 shall be inadmissible as evidence in a criminal trial over the objection of a spouse entitled to claim that privilege.

(5) PROHIBITION AGAINST USE OF TESTIMONY AGAINST RESPONDENT IN A CRIMINAL ACTION. Pursuant to D.C. Code § 16-1002(c), testimony of the respondent in a proceeding for a Civil Protection Order or Temporary Protection Order shall be inadmissible as evidence in a criminal trial except in a prosecution for perjury or false statement.

(6) LEVEL OF PROOF REQUIRED FOR CIVIL PROTECTION ORDER. If the Court finds in a fact-finding hearing that there is good cause to believe the allegations in the petition, the Court may issue the Civil Protection Order.

(c) FINDINGS. At the conclusion of a contested hearing, the Court shall make those findings of fact essential to the ultimate conclusion of law.

RULE 10

DISMISSAL OF ACTION

(a) VOLUNTARY DISMISSAL. An action may be dismissed by the petitioner, without court order, at any time before filing of an answer or counterclaim by the respondent or before entry of a Civil Protection Order by filing a notice of dismissal. Unless otherwise stated, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when filed by a petitioner who has once dismissed in any court of the United States or of any state an action based on or including the same claim. If a counterclaim has been pleaded by a respondent prior to the petitioner's dismissal, the action shall not be dismissed over the respondent's objection unless the counterclaim can remain pending for independent adjudication by the Court. If a Civil Protection Order has been entered the action shall not be dismissed over the respondent's objection if the dismissal would seriously prejudice substantial rights of the respondent granted by the order.

(b) FAILURE TO PROSECUTE. If a party fails for six (6) months from the time action may be taken to comply with any law, rule, or order requisite to the prosecution of the claim, or to take any other action to prosecute the claim, and the party has received a warning as provided below, the claim shall be dismissed with prejudice by the clerk. One (1) month before termination of the six (6) month period the clerk shall warn the dilatory party by mail that the claim will be dismissed if the party fails to take any action to prosecute the claim, making a note in the docket of the mailing. The failure to warn the party shall not affect the running of the six (6) month period but the case shall not be dismissed until thirty (30) days after notice is sent by the clerk. The six (6) month period shall be tolled for any period during which there was a bench warrant outstand-

ing against the respondent. The time in which the delinquent party may take appropriate action to reinstate under SCR Civ 60(b) shall commence from the entry of dismissal by the clerk.

(c) MOTION TO REINSTATE. Any motion to reinstate a case dismissed under paragraph (b) of this rule shall be filed in writing, accompanied by an affidavit of the attorney or party pro se, giving a good cause for failure of the case to be at issue not later than six (6) months after the filing date. If a motion to reinstate is not filed within twenty (20) days after the order of dismissal, the action shall not be reinstated.

RULE 11

ISSUANCE OR ORDERS

(a) ORDER ISSUED WHEN BOTH PARTIES ARE PRESENT. All protection orders entered by the Division shall be in writing, a copy of which shall be hand delivered to each party to the proceedings. The Court shall explain the meaning of the order to the parties and shall advise the parties that violation of the order may result in a fine or penalty of not more than $300.00 or imprisonment for not more than six (6) months, or both.

(b) CONSENT ORDER. When the respondent has consented to having a Civil Protection Order issued, the Court shall make sufficient inquiry to be assured that:

(1) the respondent voluntarily consented to the issuance of the Civil Protection Order; and

(2) the parties understand the contents of the Order.

(c) ORDER ISSUED IN THE ABSENCE OF RESPONDENT. When a Civil Protection Order or Temporary Protection Order is issued without the respondent's presence, the Court shall deliver an additional copy of the Order to the petitioner for service upon the respondent. The Court shall inform the petitioner that the Order is valid and effective, but that the respondent cannot be held in contempt of Court for violation of the Order unless the violation is committed after the respondent is legally served with a copy of it pursuant to Rule 3. The Court may for good cause order that a member of the Metropolitan Police Department accompany an individual designated to serve the Order by the petitioner.

(d) ISSUANCE OF ORDER AGAINST BOTH PARTIES. No Civil Protection Order may be issued unless a Petition and Affidavit have been filed and served upon the individual who is the subject of the Order pursuant to Rules 2 and 3 of these Rules, unless the individual, after having been apprised by the Court of his or her rights with respect to the filing of a Petition and Affidavit and to a hearing on such Petition, understandingly consents to the issuance of an Order binding him or her, provided, however, that the Court may, as a condition of the issuance of a Civil Protection Order in favor of any party, require that party to abide by such fair and reasonable conditions as may be necessary and appropriate to ensure fairness and facilitate compliance with the Civil Protection Order.

(e) AVAILABLE REMEDIES. If, after hearing, the Court finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order:

(1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family member,

(2) requiring the respondent, alone or in conjunction with any other member of the family before the Court, to participate in psychiatric or medical treatment or appropriate counseling programs,

(3) directing, where appropriate, that the respondent avoid the presence of the family member endangered,

(4) directing the respondent to refrain from entering, or to vacate, the dwelling unit of the complainant when the dwelling is:

(A) marital property of the parties, or

(B) jointly owned, or

(C) owned, leased or rented by the complainant individually, or

(D) jointly owned, leased or rented by the complainant and a person other than the respondent,

(5) directing the respondent to relinquish the use of certain personal property owned jointly by the parties or by the complainant individually,

(6) awarding temporary custody of a minor child of the parties,

(7) determining visitation rights with appropriate restrictions to protect the safety of the complainant and the minor children,

(8) awarding litigation costs and attorney fees,

(9) ordering the Metropolitan Police Department to take such action as the Family Division deems necessary to enforce its orders,

(10) directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter, or

(11) combining two or more of the directions or requirements prescribed by the preceding paragraphs.

(f) DURATION AND EXTENSION. A Civil Protection Order shall be in effect for one (1) year unless

the Court has provided for a lesser period of time. Upon written motion of any party to the original proceeding, the Court may extend, rescind or modify an order for good cause shown.

RULE 12

CONTEMPT

(a) IN THE PRESENCE OF JUDGE. A criminal contempt may be punished summarily if the judge certifies that he or she saw or heard the conduct constituting the contempt and that it was commited in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) VIOLATION OF PROTECTION ORDER. A motion alleging one or more violations of a Temporary Protection Order or Civil Protection Order shall be filed and served pursuant to Rule 7(c).

(c) CONTEMPT HEARING PROCEDURES.

(1) The respondent has the right to counsel and shall be so advised.

(2) Anytime the judge contemplates imposing a sentence of imprisonment if the contempt is proven beyond a reasonable doubt, the judge may appoint counsel for the respondent. The Court may also request that the Corporation Counsel represent the petitioner.

(3) If the respondent requests a continuance the judge may grant the continuance on any one or all of the following conditions:

(A) that any existing Temporary Protection Order or Civil Protection Order be extended,

(B) that additional conditions to ensure the safety of the moving party be imposed

(e.g., vacation of the premises pending the continuance; a temporary total ban on visitation; awarding temporary custody of a minor child of the parties),

(C) that the respondent receive no further continuances.

(4) Both parties have the right to present sworn testimony of witnesses and other evidence in support of or in opposition to the motion. The respondent may not be compelled to testify or give evidence.

(d) APPLICATION OF THE SPOUSAL PRIVILEGE. One spouse is a competent and compellable witness against the other and may testify as to confidential communications, but testimony compelled over a claim of privilege shall be inadmissible as evidence in a criminal trial over the objection of a spouse entitled to claim that privilege.

(e) PUNISHMENT UPON FINDING OF CONTEMPT BY THE DIVISION. Contempt may be punished by a fine or penalty of not more than $300.00 or by imprisonment for not more than six (6) months, or both.

RULE 13

APPEAL

(a) APPEALABLE ORDER. Any final order issued pursuant to D.C. Code § 16-1005, any order granting or denying extension, modification, or *rescission of such order, or any adjudication of contempt shall be appealable to the District of Columbia Court of Appeals and shall be governed by the rules of that court.

(1) A notice of appeal shall be filed within thirty (30) days after entry of any final order

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* Correction

(e.g. a Civil Protection Order, an order granting or denying modification or *rescission, an adjudication of contempt).

(2) Upon a showing of excusable neglect, the Superior Court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of the time prescribed in subparagraph (a)(1) of this rule. However, if such a request is made after the initial thirty (30) day period has expired, the request shall be made by motion, with notice to the other parties.

(b) STAY OF ORDER APPEALED FROM. The Division may stay its order pending appeal upon such terms and conditions as the Division deems proper only on written motion of the appellant, with notice to the appellee.